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# Mandating Public School Attendance: A Proposal for Achieving Racial and Class Integration

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# MANDATING PUBLIC SCHOOL ATTENDANCE: A PROPOSAL FOR ACHIEVING RACIAL AND CLASS INTEGRATION

Thomas Kleven\*

## I. Introduction

A major factor impeding equal educational opportunity in the United States today is that public schools are largely and increasingly segregated by race and class.<sup>1</sup> By and large, lower income and minority children receive an inferior education relative to better off children, have higher drop out rates, attend college less frequently, and consequently fare less well in life economically.<sup>2</sup> Rather than leveling the playing field, as should be the goal of public education in a democratic society, the system today does just the opposite: as it is structured and operates, it helps perpetuate inequality in opportunity and outcome.

There have been attempts over the past few decades to address these inequalities, in particular efforts to desegregate and reform the financing of public schools, but these

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<sup>1</sup> See, e.g., Gary Orfield & Chungmei Lee, *Historic Reversals, Accelerating Resegregation, and the Need for New Integration Strategies* available at [http://www.civilrightsproject.ucla.edu/research/deseg/reversals\\_reseg\\_need.pdf](http://www.civilrightsproject.ucla.edu/research/deseg/reversals_reseg_need.pdf); (August 2007) (documenting the decreasing percentage of whites and the increasing percentage of poor children in public schools, increasing racial segregation since the early 1980s following a period of increased integration beginning in the early 1960s, the high incidence of segregation for all racial groups except Asians and with whites being the most segregated, the confluence of segregation by race and poverty with the average black and Latino attending a school more than half poor, and the general inferiority of minority schools); Gary Orfield & Chungmei Lee, *Racial Transformation and the Nature of Segregation* (January 2006) available at [http://www.civilrightsproject.ucla.edu/research/deseg/Racial\\_Transformation.pdf](http://www.civilrightsproject.ucla.edu/research/deseg/Racial_Transformation.pdf) (documenting between 1991-92 and 2003-04 the increased incidence of minorities attending public schools predominantly (50% or more) and substantially (90% or more) of their own ethnicity, as well as the high incidence of segregation by race and poverty combined, while also noting the emergence of substantial numbers of multiracial schools due to the increasingly minority composition of public school students as a whole).

<sup>2</sup> See, e.g., *Historic Reversals*, *supra* note 1, at 38-40 (citing and discussing studies showing a link between school segregation and high drop out rates of minority students); Gary Orfield & Chungmei Lee, *Why Segregation Matters: Poverty and Educational Inequality* available at [http://www.civilrightsproject.ucla.edu/research/deseg/Why\\_Segreg\\_Matters.pdf](http://www.civilrightsproject.ucla.edu/research/deseg/Why_Segreg_Matters.pdf) (January 2005) (citing data and studies showing a strong relationship between racial segregation with high concentrations of poverty and educational inequalities in terms of teacher quality, test scores and drop out rates); John A. Powell, *An "Integrated" Theory of Integrated Education*, Section I.A available at <http://www.civilrightsproject.ucla.edu/research/reseg02/powell.pdf> (discussing the educational harms of segregation and concentrated poverty).

efforts have proved only moderately successful at best.<sup>3</sup> Many lower income and minority children remain essentially trapped in inner city schools and districts where most students are from the same socio-economic and ethnic background, and many of which are underfunded relative to the surrounding suburbs.<sup>4</sup> Many educators believe that racial and class integration is necessary to equalize educational opportunity.<sup>5</sup>

Two major factors contributing to high concentrations of poverty in inner city schools have been middle and upper class flight, largely though not entirely of whites, from inner cities to suburbia and from public to private schools. Many inner city school

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<sup>3</sup> See, e.g., Thomas E. Kleven, *Brown's Lesson: To Integrate or Separate Is Not the Question, But How to Achieve a Non-Racist Society*, 5 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 43 (2005) (tracing the history of school desegregation); Molly S. McUsic, *The Law's Role in the Distribution of Education: The Promises and Pitfalls of School Finance Litigation* in LAW AND SCHOOL REFORM 88 (J.P. Heubert, ed. 1999) (tracing the history of school finance litigation).

<sup>4</sup> See U.S. Census Bureau, Public Education Finances 2006, Table 17 (April 2007) available at <http://ftp2.census.gov/govs/school/06f33pub.pdf>. As a perusal of the Census Bureau data will show, many big city school districts spend at or above the state-wide average per pupil among districts with over 10,000 students. This does not necessarily mean that a state's financing system is fair. In some states there may be smaller suburban districts that are not reflected in the Census Bureau data and spend more on education. And inner cities may have to tax their relatively poorer citizenry more heavily than suburban districts in order to raise funds for education and other services associated with high concentrations of poverty. Moreover, while money is obviously related to educational quality, it appears that money alone is not enough to equalize educational opportunities for lower income children due to other factors associated with high concentrations of poverty. See, e.g., RICHARD D. KAHLENBERG, ALL TOGETHER NOW: CREATING MIDDLE CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE 82-84 (2001) (citing and discussing studies showing that among family influence, the economic status of one's classmates and per pupil expenditures, the latter matters least in determining student achievement).

<sup>5</sup> See, e.g., KAHLENBERG *supra* note 4, at 23-37, 116-35 (2001) (citing and discussing studies showing the educational benefits of socio-economic integration to all students, advocating a system of "controlled choice" under which parents select the schools their children will attend and selections are honored so as to foster integration defined as a school in which a majority of students are middle class, and opining that through controlled choice most school districts could achieve integration within existing boundaries); Molly S. McUsic, *The Future of Brown v. Board of Education: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334 (2004) (arguing, on the basis of studies showing its benefits, that economic integration of schools offers the most promising way to achieve *Brown's* goal of equal educational opportunity for all children); Russell W. Rumberger & Gregory J. Palardy, *Does Segregation Still Matter? The Impact of Student Composition on Academic Achievement in High School*, 107 TEACHERS COLLEGE RECORD 1999, 2020 (Sept. 2005) available at [http://education.ucsb.edu/rumberger/internet%20pages/Papers/Rumberger%20%20Palardy--Does%20segregation%20still%20matter%20\(TCR%202005\).pdf](http://education.ucsb.edu/rumberger/internet%20pages/Papers/Rumberger%20%20Palardy--Does%20segregation%20still%20matter%20(TCR%202005).pdf) (concluding, based on analysis of National Education Longitudinal Survey data, that "all students, whatever their race, social class, or academic background, who attended high schools with other students from high social class backgrounds learned more, on average, than students who attended high schools with other students from low social class backgrounds," and that these results were largely attributable to higher teacher expectations, greater academic rigor, and feelings of safety in schools of higher socio-economic status).

districts that once had significant numbers of white and of middle to upper income students now have few.<sup>6</sup> Nevertheless, because significant numbers remained and put their children in private schools, the overall population in many inner cities is more ethnically and economically diverse than their schools.<sup>7</sup> Moreover, with gentrification some middle and upper income people, many of whom are younger professionals without children or just starting families, are beginning to return to the inner cities.<sup>8</sup>

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<sup>6</sup> As of 1975, about 76% of all public school students in the United States, and about 52% of students in the central cities of metropolitan areas, were White. As of 2005, about 57% of all students and about 35% of students in central cities were White. The loss of white students has been greatest in the larger cities. As of 1996, the last year for which I could find data, about 59% of the students in the central cities of all metropolitan areas were White, whereas in the central cities of metropolitan areas of one million or more, where more than half of all students attended, only about 33% were White. The latter figure is undoubtedly even lower today. U.S Census Bureau, School Enrollment-Social and Economic Characteristics of Students: October 1975, Table 3 *available at* <http://www.census.gov/population/www/socdemo/school/p20-303.html>; U.S. Census Bureau, Enrollment Below College for People 3-24 Years Old, by Control of School, Sex, Metropolitan Status, Race, Hispanic Origin: October 2005, Tables 5-1 & 5-3 *available at* <http://www.census.gov/population/www/socdemo/school/cps2005.html>; U.S. Census Bureau, Level of Enrollment Below College: October 1996, Table 5 *available at* <http://www.census.gov/prod/3/98pubs/p20-500u.pdf>. (The percentages are extrapolations from the gross numbers shown in the reports. The figures for 2005 are of non-Hispanic Whites. Since the 1975 and 1996 data does not show non-Spanish or non-Hispanic Whites, I subtracted students of Spanish and Hispanic origin from White in order to estimate non-Hispanic Whites. Since students of Spanish or Hispanic origin are of all races, the White percentages for 1975 and 1996 may be slightly high, but not by much since most of Spanish and Hispanic origin are of Mexican descent and likely classified as White.)

<sup>7</sup> See *infra* note 43.

<sup>8</sup> See, e.g., Maureen Kennedy & Paul Leonard, *Dealing with Neighborhood Change: A Primer on Gentrification and Policy Choices* (April 2001) *available at* <http://www.brookings.edu/reports/2001/04metropolitanpolicy.aspx> (describing and presenting case studies of the gentrification process and proposing measures to ensure that it occurs within an “equitable development framework” of economically and socially diverse communities, while noting that gentrification is a relatively small counter-trend in some locales to the still dominant trend across the country of a steady movement of jobs and people to suburbia leaving inner cities and nearby suburbs with concentrated poverty and distress); LORETTA LEES ET AL, GENTRIFICATION xxiii (2008) (examining the positive view of gentrification as contributing to inner city revitalization and social mixing as against the negative view of gentrification as displacing working class neighborhoods and contributing to social hierarchy and inequality, arguing that policy makers have largely ignored the negative aspects, and advocating a “critical geography of gentrification . . . that follows a social justice agenda and . . . is . . . focused on resisting gentrification where necessary”); NEIL SMITH, THE NEW URBAN FRONTIER: GENTRIFICATION AND THE REVANCHIST CITY vii, viii (1996) (arguing that gentrification is a world-wide phenomenon as an aspect of “the centrality of urban development to national and international expansion,” and that especially in the United States it embodies “a revengeful and reactionary viciousness against various populations accused of ‘stealing’ the city from white upper classes”). I would argue that one way to try to combat the hierarchical and revengeful aspects of gentrification is to mandate that the children of gentrifiers attend public school.

Inner city school districts might try to enhance economic and ethnic diversity and to obtain more money for education by requiring all students residing therein to attend public school. Bringing those now attending private schools into the public school system might make efforts to achieve diversity more feasible, and might induce them to be more supportive as taxpayers of increased funding for public schools. This paper proposes that inner city school districts experiment with this approach to providing for equal educational opportunity for all.

Mandating all students to attend public school is not a panacea. It will not work in very hard-pressed inner cities with few white and middle to upper income people left, nor if it induces an end to gentrification and a new round of white and middle to upper income flight to suburbia, nor if the revenue gained is offset by the increased cost of educating more students. Nor will it address societal inequalities over which school authorities have little control and which may impact student performance as much or more than educational reforms.<sup>9</sup> But in particular contexts mandatory public school attendance may contribute to equalizing educational opportunities. And with other options limited, and until more widespread societal reform becomes possible, it may be the only game in town.

Implementing mandatory public school attendance and reconciling it with democratic principles may require changes in the way in which public schools operate, as

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<sup>9</sup> See, e.g., RICHARD ROTHSTEIN, CLASS AND SCHOOLS: USING SOCIAL, ECONOMIC, AND EDUCATIONAL REFORM TO CLOSE THE BLACK-WHITE ACHIEVEMENT GAP 5, 9 (2004) (arguing, based on an analysis of extant studies, that while educational reform can contribute to improved performance, student achievement is significantly impacted by social class characteristics whose influence “is probably so powerful that schools cannot overcome it,” and suggesting “the greater importance of reforming social and economic institutions if we truly want children to emerge from school with equal potential”); Rumberger & Palardy, *supra* note 5, at 2023 (noting that, while class integration contributes to improved student performance, “most of the variability in student achievement overall . . . is associated with the students (and their families and communities), not the schools they attend . . . [such that] to achieve true equality of opportunity will require addressing the pervasive inequalities found in family and community resources”).

well as modifications to prevailing constitutional law. First, pursuant to *Pierce v. Society of Sisters*,<sup>10</sup> parents have a constitutional right to opt out of the public school system and put their children in private schools. This ruling will have to be reversed or interpreted to allow mandatory public school attendance when a sufficiently strong case for overriding parental prerogatives exists – as I argue is the case here.

Second, while some accommodation for religious practices in public schools is already the law,<sup>11</sup> an expansion thereof may be required in order to satisfy the free exercise concerns resulting from the effective forced closure of the parochial schools many parents choose for religious reasons. In addition, school authorities may have to revamp the educational program to provide more diverse educational opportunities, like Montessori or specialized magnet schools, in order to accommodate those who choose private schools because they perceive them to be more tailored to their children's needs. Fairly and proportionately responding to the educational needs of all students, I shall argue, is required by democratic principles implicit in the Constitution.

Responding to the needs of all may also be necessary in order to gain the political support of those whose children attend private schools. Making public schools more attractive should make mandatory attendance and increased public school funding more palatable to parents who now pay tuition for private schools and taxes for public schools their children do not attend. They could well end up with an equally good educational experience for their children at less cost.

Finally, mandating attendance calls into question the role of public education in a democratic society, and in particular the extent to which public schools may be used to

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<sup>10</sup> 268 U.S. 510 (1925).

<sup>11</sup> See *infra* Part IV.C.

promote the values of the majority. Here I shall argue that while democratic principles permit school authorities to promote core democratic values, they generally require a neutral approach to the teaching of values. This too may call for the modification of prevailing constitutional law, or at least of the rhetoric appearing in some cases.

Section II discusses the historical context giving rise to the proposal to mandate public school attendance, and the proposal's merits and limitations. Section III argues that while *Pierce v. Society of Sisters* may have been correctly decided in the context of the times, there is today a constitutionally permissible and compelling justification for mandating attendance at public schools. Section IV argues that a principle of equitable sharing, flowing from democratic principles and implicit in the Constitution, requires that in implementing the mandate public school authorities proportionately respond to the educational needs of all students including their educationally-related religious needs. Section V evaluates the implications of democratic principles for the appropriateness of school authorities' use of public schooling to promote values. Section VI concludes.

## **II. The Argument for Mandating Public School Attendance**

### **A. The Historical Background**

In the first few decades following *Brown v. Board of Education*,<sup>12</sup> due to the efforts of the judiciary and the federal government, the numbers of African-American children attending integrated public schools increased considerably.<sup>13</sup> Since then the trend has reversed and about as many African-American and other minority children now attend substantially segregated schools as at the time of *Brown*.<sup>14</sup> In addition, public schools are substantially segregated by class, school districts with large numbers of

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<sup>12</sup> 347 U.S. 483 (1954).

<sup>13</sup> *Historic Reversals*, *supra* note 1; *Racial Transformation*, *supra* note 1.

<sup>14</sup> *Historic Reversals*, *supra* note 1.

minority and working class students often spend less money on education than the richer districts, and the children in the segregated and poorer districts tend to fare less well educationally.<sup>15</sup> Many metropolitan areas have inner city school districts that are predominantly minority and working class and are surrounded by suburban school districts, most of which (except for some inner ring suburbs that resemble the inner city) are largely white and economically better off than the inner city.<sup>16</sup>

Several factors have contributed to this situation. With the increasing suburbanization of America following the Second World War, many middle to upper income whites (and in recent years some more affluent ethnic minorities) left inner cities for suburbia, while inner cities' minority and working class populations remained the same or increased.<sup>17</sup> Meanwhile, many economically better off families who remained in inner cities have placed their children in private schools.<sup>18</sup> The effort of the federal courts between the mid 1960s and mid 1980s to integrate school districts where law or

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<sup>15</sup> powell, *supra* note 2; U.S. Census Bureau, *supra* note 4.

<sup>16</sup> See, e.g., Jason C. Booza et al., *Where Did They Go? The Decline of Middle-Income Neighborhoods in Metropolitan America* (June 2006) available at [http://www.brookings.edu/metro/pubs/20060622\\_middleclass.pdf](http://www.brookings.edu/metro/pubs/20060622_middleclass.pdf); MYRON ORFIELD, AMERICAN METROPOLITICS: THE NEW SUBURBAN REALITY 23-64, 93-95 (2002); Robert Puentes & David Warren, *One-Fifth of the Nation: A Comprehensive Guide to America's First Suburbs* (Feb. 2006) available at [http://www.brookings.edu/metro/pubs/20060215\\_FirstSuburbs.pdf](http://www.brookings.edu/metro/pubs/20060215_FirstSuburbs.pdf); Todd Swanstrom et al., *Pulling Apart: Economic Segregation Among Suburbs and Central Cities in Major Metropolitan Areas* (2004) available at [http://www.brookings.edu/metro/pubs/20041018\\_econsegregation.pdf](http://www.brookings.edu/metro/pubs/20041018_econsegregation.pdf).

<sup>17</sup> See cites at note 16, *supra*; KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 203-251, 283-305 (1985).

<sup>18</sup> See, e.g., CHARLES T. CLOTFELTER, AFTER BROWN: THE RISE AND RETREAT OF SCHOOL DESEGREGATION 123, 100-25 (2004) (finding that "private schools do appear to have contributed to racial segregation in K-12 schools, though their contribution is significantly less than that attributable to racial disparities among school districts"); Robert W. Fairlie, *Racial Segregation and the Private/Public School Choice* (February 2006) available at [http://www.ncspe.org/publications\\_files/OP124.pdf](http://www.ncspe.org/publications_files/OP124.pdf) (finding that blacks and Hispanics are substantially underrepresented in private schools, that whites and Hispanics enroll in private school in response to high concentrations of black students in public schools, and that family income is directly related to and a major determinant of who attends private school); Eric J. Isenberg, *The Choice of Public, Private, or Home Schooling* 14-19 (October 2006) available at <http://client.norc.org/jole/SOLEweb/7338.pdf> (finding that the poor quality of public schools is a significant factor motivating parents to choose private schools especially for the well educated, and that families living inside metropolitan areas and in locales with greater income heterogeneity are more likely to choose private schools).



official practice had separated the races undoubtedly helped spur white flight to suburbia and private schools.<sup>19</sup> In the mid 1970s the Supreme Court began to back off from its integrationist push by declining to extend inner city desegregation remedies to suburbia.<sup>20</sup> Then in the early 1990s the Court essentially declared the era of judicially enforced desegregation at an end.<sup>21</sup> Since then, school segregation by race and class has increased substantially.<sup>22</sup>

In addition, market forces and the exclusionary zoning practices of the better-off suburban communities have pushed the cost of housing there beyond the means of most minorities and working class people.<sup>23</sup> Consequently, they have little option but to remain in less well off inner cities and nearby suburbs. This demographic pattern, coupled with the fact that in most states school districts must rely heavily on their own tax revenues to finance themselves, often results in poorer districts with disproportionate

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<sup>19</sup> See, e.g., DAVID J. ARMOR, *FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW* 176-80 (1995) (discussing several studies finding that school desegregation efforts caused significant white flight from public schools); CLOTFELTER, *supra* note 18, at 81-91 (concluding, based on own study and analysis of others, that desegregation contributes to white flight); Christine H. Rossell, *The Effectiveness of Desegregation Plans* in *SCHOOL DESEGREGATION IN THE 21<sup>ST</sup> CENTURY* 67, 91-95 (C. Rossell et al, eds. 2002) (concluding, based on an analysis of enrollment changes in districts over 5000 enrollment between 1968 and 1991, that desegregation plans cause substantial white flight from public schools and at the same time produce significantly more interracial exposure).

<sup>20</sup> *Milliken v. Bradley*, 418 U.S. 717 (1974) (court-ordered desegregation plan may not incorporate suburban school districts that have not practiced segregation).

<sup>21</sup> *Freeman v. Pitts*, 503 U.S. 467, 471 (1992) (“[A] district court is permitted to withdraw judicial supervision with respect to discrete categories in which the school district has achieved compliance with a court-ordered desegregation plan. A district court need not retain active control over every aspect of school administration until a school district has demonstrated unitary status in all facets of its system.”); *Board of Education of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 249-50 (1991) (in deciding whether time has come to terminate judicially supervised desegregation, “[t]he District Court should address itself to whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable”).

<sup>22</sup> *Historic Reversals*, *supra* note 1; *Racial Transformation*, *supra* note 1.

<sup>23</sup> See, e.g., MICHAEL M. DANIELSON, *THE POLITICS OF EXCLUSION* 50-106 (1976); ORFIELD, *supra* note 16, at 49-64, 88-95.

numbers of minorities and working class people being able to raise and spend far less money for public education than richer districts.<sup>24</sup>

The Supreme Court has facilitated these disparities in the *Arlington Heights* case, which declined to address exclusionary zoning absent a showing of purposeful racial discrimination,<sup>25</sup> and in the *Rodriguez* case which upheld the constitutionality of local financing of schools.<sup>26</sup> Although some state courts have attempted to use their own constitutions to attack exclusionary zoning and school financing inequalities, their reform efforts have achieved only modest success.<sup>27</sup> A major reason for this is the difficulty courts have in remedying complex social problems when political forces are arrayed against them, as has been the case with respect to these issues.<sup>28</sup>

In response to this situation, there have been a number of political initiatives designed to improve educational opportunities for the disadvantaged. School vouchers have been tried in a few locales as a way to afford lower income students access to

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<sup>24</sup> See, e.g., Carmen G. Arroyo, *The Funding Gap* (January 2008) available at [http://www.nvasb.org/Publications/Research\\_Data/the\\_funding\\_gap.pdf](http://www.nvasb.org/Publications/Research_Data/the_funding_gap.pdf); Bruce J. Biddle & David C. Berliner, *What Research Says About Unequal Funding for Schools in America* (2003) available at [http://www.wested.org/online\\_pubs/pp-03-01.pdf](http://www.wested.org/online_pubs/pp-03-01.pdf).

<sup>25</sup> *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

<sup>26</sup> *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

<sup>27</sup> Richard Briffault, *Our Localism: Part 1 – The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 18-58 (1990) (a history of the efforts of state courts to address exclusionary zoning and school finance, and assessments of their successes and failures); McUsic, *supra* note 3 (concluding that school finance litigation has had limited success in bringing about reform); Henry A. Span, *How Courts Should Fight Exclusionary Zoning*, 32 SETON HALL L. REV. 8, 38-72 (2001) (arguing that the few state court efforts to date to combat exclusionary zoning have had only modest success and have resulted in little racial or socio-economic integration).

<sup>28</sup> See, e.g., Robert P. Inman & Daniel L. Rubinfeld, *The Judicial Pursuit of Local Fiscal Equity*, 92 HARV. L. REV. 1662, 1731-43 (1979) (concluding that judicial efforts to bring about a more egalitarian distribution of local services by reforming exclusionary zoning and school finance, even if vigorously pursued, would likely be undercut by antiequalizing economic adjustments by the well off in the private sector); GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991) (arguing that courts are highly limited in their ability to bring about meaningful social change due to a lack of sufficient independence from other branches of government on whose support they depend to implement their rulings, and that courts are most effective when they follow rather than lead political reform).

private schools.<sup>29</sup> Charter schools, certified public or private schools funded with state and local funds and freed of many state regulations so that they can experiment with innovative educational approaches, have been tried in a number areas.<sup>30</sup> A few cities have experimented with Afro-centric academies that emphasize black culture and pride as a way in particular to aid black males.<sup>31</sup> The federal No Child Left Behind Act requires states to develop student achievement standards to be evaluated through standardized testing, to provide students from failing schools with the option to choose to attend better performing ones, and ultimately to close schools that don't measure up.<sup>32</sup>

The impact of these initiatives is inconclusive, and all may have their merits. Nevertheless, there are skeptics. Some commentators fear that vouchers and charter schools may exacerbate racial and class segregation and further entrench educational inequalities.<sup>33</sup> Some studies indicate that, when controlled for race and class, the

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<sup>29</sup> For a history and evaluation of the voucher movement, see, e.g., BRIAN GILL ET AL, RHETORIC VERSUS REALITY: WHAT WE KNOW AND WHAT WE NEED TO KNOW ABOUT VOUCHERS AND CHARTER SCHOOLS 1-70 (2007); THOMAS L. GOOD & JENNIFER S. BRADEN, THE GREAT SCHOOL DEBATE: CHOICE, VOUCHERS, AND CHARTERS 86-113 (2000).

<sup>30</sup> For a history of the charter school movement, see, e.g., GILL ET AL, *supra* note 29; GOOD & BRADEN, *supra* note 29, at 114-36; Carolyn M. Hoxby, *The Supply of Charter Schools* in CHARTER SCHOOLS AGAINST THE ODDS 1 (P. Hill, ed. 2006).

<sup>31</sup> See, e.g., Eleanor Brown, *Black Like Me? "Gangsta" Culture, Clarence Thomas, and Afrocentric Academies*, 75 N.Y.U. L. REV. 308 (2000) (advocating Afrocentric curricula); Kevin Brown, *Do African-Americans Need Immersion Schools: The Paradoxes Created by Legal Conceptualization of Race*, 78 IOWA L. REV. 813 (1993) (discussing the merits of immersion schools for African Americans and the legal issues involved in creating them); Sonia R. Jarvis, *Brown and the Afrocentric Curriculum*, 101 YALE L.J. 1285 (1992) (advocating Afrocentric education).

<sup>32</sup> See, e.g., Gershon M. (Gary) Ratner, *Why the No Child Left Behind Act Needs To Be Restructured To Accomplish its Goals and How To Do It*, 9 U. D.C. L. REV. 1, 3-13 (2007) (describing the goals and structure of the Act); James E. Ryan, *The Perverse Incentives of The No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 937-44 (2004) (describing the workings of the Act).

<sup>33</sup> See, e.g., James A. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2047-48 (2002) (arguing that, just as suburban political power thwarted the extension of desegregation from inner cities to suburbia and has impeded efforts to equalize school funding, "unless the politics surrounding school choice are altered, school choice plans will continue to be structured in ways that protect the physical and financial independence of suburban public schools . . . [and] will lead to, at best, limited academic improvement, [and] little or no gain in racial and socio-economic integration"). Others have a more positive view of the potential benefits of vouchers and charter schools. See, e.g., CHARTER SCHOOLS AGAINST THE ODDS, *supra* note 30, at 127-203 (articles on the potential benefits of charter schools); James Forman Jr., *Do Charter Schools Threaten Public Education? Evidence from Fifteen*

performance of children in voucher and charter schools does not differ much and may be somewhat lower than that of public school students.<sup>34</sup> The No Child Left Behind Act has been criticized for imposing unfunded mandates that poorer school districts will be unable to meet without additional money.<sup>35</sup> It has also been criticized for inducing states to adopt low achievement standards to avoid the risk of sanctions, encouraging rote learning rather than teaching students to reason, and failing to improve the educational performance of disadvantaged minorities.<sup>36</sup>

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*Years of a Quasi-Market for Schooling*, 2007 U. ILL. L. REV. 839 (arguing that the existing data suggests that charter schools do not threaten public education, that in general charter schools have not “cream-skimmed” whites and economically better-off students from public schools, and that rather than undermining support for public-school funding charter schools might become allies with public schools in the pursuit of increased government expenditures for education; although noting the need for regulation to prevent charter schools from engaging in selective admissions practices, the uncertainty of whether charter schools skim students of higher academic ability or from well educated families, and the possibility that the current focus on standardized testing might impel charter schools to cream skim); James Forman, Jr., *The Rise and Fall of School Vouchers: A Story of Religion, Race, and Politics*, 84 U.C.L.A. L. REV. 547, 579-84 (2007) (noting the uncertainty to date of the educational impact of voucher programs on minority students who receive them and those who remain in public schools, and suggesting that vouchers are a worthwhile experiment along with efforts to promote socio-economic integration of suburban schools); THE EMANCIPATORY PROMISE OF CHARTER SCHOOLS (Eric Rofes & Lisa M. Stulberg, eds. 2004) (a series of essays arguing that community controlled charter schools geared to the needs of low-income students and students of color offer an emancipatory potential for the disadvantaged and disenfranchised).

<sup>34</sup> This seems to be the prevailing sentiment of the studies, although the data to date is not entirely conclusive and the results vary in different contexts. See, e.g., National Center for the Study of Privatization in Education available at [http://www.ncspe.org/list\\_papers.php](http://www.ncspe.org/list_papers.php) (a series of studies on the impact of charter and voucher schools); CHARTER SCHOOL OUTCOMES 163-281 (Mark Berends et al, eds. 2008) (studies of the impact of charter schools in California, North Carolina and Idaho); GILL ET AL, *supra* note 29, at 79-125 (discussing various studies on the impact of vouchers and charter schools on the academic achievement of those attending and on those remaining in traditional public schools); GOOD & BRADEN, *supra* note 29, at 137-87 (discussing studies of educational achievement in charter versus traditional public schools).

<sup>35</sup> See, e.g., Michael Heise, *The Political Economy of Education Federalism*, 56 EMORY L.J. 125 (2006) (concluding that while NCLB is not unconstitutionally coercive it is coercive from a policy perspective, and discussing the wisdom of unfunded federal coercion); L. Darnell Weeden, *Essay: Does the No Child Left Behind Law (NCLBA) Burden the States as an Unfunded Mandate under Federal Law?* 31 T. MARSHALL L. REV. 239 (2006) (arguing that NCLB is an unconstitutional federal mandate).

<sup>36</sup> See, e.g., Jaekyung Lee, *Tracking Achievement Gaps and Assessing the Impact of NCLB on the Gaps* (June 2006) available at [http://www.civilrightsproject.ucla.edu/research/esea/nclb\\_naep\\_lee.pdf](http://www.civilrightsproject.ucla.edu/research/esea/nclb_naep_lee.pdf) (concluding, based on analysis of National Assessment Educational Program data, that NCLB has not significantly contributed to improving educational achievement nor to closing the achievement gap between whites and disadvantaged minorities); Ratner, *supra* note 32 (criticizing NCLB for inducing states to lower academic standards and failing to promote systemic reform, and recommending changes to make it more effective); Ryan, *supra* note 32 (criticizing NCLB for encouraging lower academic standards, deterring quality teachers, and promoting the segregation and pushing out of minority and poor students, and recommending changes to avoid these defects).

Moreover, a number of studies purport to show the importance of combined race and class integration for improving the performance of disadvantaged children. In general, they conclude that race and class integration helps disadvantaged children while not adversely affecting the more advantaged.<sup>37</sup> If these studies are accurate, they suggest that all the above initiatives are likely to fall short if they leave disadvantaged children in predominantly minority and lower income schools.

In an effort to promote integration, a few school districts have adopted race or class-based attendance plans.<sup>38</sup> However, such plans are viable only in districts with sufficient numbers of non-minority and middle to upper income students in attendance.<sup>39</sup> In other locales, suburban districts have agreed to accept inner city children in their schools.<sup>40</sup> This approach seems most promising when coupled with efforts, such as the development of magnet schools, to attract suburbanites to inner city schools. Otherwise, it will likely benefit only a few select students.<sup>41</sup> And it may leave those who remain in

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<sup>37</sup> See cites at note 5, *supra*.

<sup>38</sup> See, e.g., *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738 (2007) (striking down as violating equal protection race conscious integration plans of Seattle, Washington and Jefferson County, Kentucky); Richard D. Kahlenberg, *Rescuing Brown v. Board of Education: Profiles of Twelve School Districts Pursuing Socioeconomic School Integration* (2007) available at <http://www.tcf.org/publications/education/districtprofiles.pdf> (describing the socioeconomic integration plans of 12 of the approximately 40 school districts using them, and concluding that properly designed plans can promote racial integration and boost academic achievement).

<sup>39</sup> See, e.g., Amy Stuart Wells & Robert L. Crain, *Where School Desegregation and School Choice Policies Collide: Voluntary Transfer Plans and Controlled Choice* in *SCHOOL CHOICE AND DIVERSITY* 59, 71-75 (J. Scott, ed. 2005) (reporting that studies of controlled choice plans designed to promote racial integration show some though inconclusive promise, while suggesting that they may be less viable in large urban districts than in smaller ones with sizable white populations).

<sup>40</sup> See, e.g., Erica Frankenberg, *Voluntary Integration After Parents Involved: What does research tell us about available options?* (December 2007) available at <http://chhi.podconsulting.net/assets/documents/publications/Frankenberg%20-%20Voluntary%20Integration%20After%20PICS.pdf> (describing inner city-suburban integration plans in Boston, Hartford, Minneapolis and St. Louis).

<sup>41</sup> See, e.g., Wells & Crain, *supra* note 39, at 60-72 (reporting that three of the more prominent inter-district transfer plans in Boston, Hartford and St. Louis that allowed inner city minority students to transfer to suburban school districts involved a relatively small number of students of generally higher socio-economic status and who generally benefited from the opportunity in terms of educational performance and life chances).

the inner city worse off if those who take advantage of the opportunity are the better students or if the inner city must compensate or loses state funds to the suburban districts. Moreover, suburban districts in many locales may not be amenable to cross district plans, and logistical problems like transportation costs and distances may impede the approach.

### **B. Mandating Public School Attendance**

The foregoing is the backdrop of the proposal here that inner city school districts with significant numbers of students at private schools require all students to attend the public schools.<sup>42</sup> The argument, in brief, is that inner city school districts with large numbers of minority and poorer students are largely on their own in attending to the needs of their students, that requiring all children to attend public school might facilitate efforts to achieve more race and class integration, and that integration by itself or along with some of the other measures discussed above is perhaps the most promising way to assure equal educational opportunity for all. To me, it is at least an approach worth trying.

But it is not a panacea, may be viable in some locales but not others, and has potential difficulties. First, requiring all to attend public school will not contribute to race or class integration unless substantial numbers of white and economically better off families with children in private school reside there. This appears to be the case in some

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<sup>42</sup> Compare James S. Liebman, *Book Review, Voice Not Choice*, 101 YALE L.J. 259, 302-308 (1991) (opposing vouchers and other school choice plans facilitating exit from the public school system per their likely contribution to a hierarchical and inequalitarian educational system, and recommending consideration of mandatory public school attendance as a way to bring about ethnic and class integration). Liebman's and my proposals are similar in many respects. His applies across the board, whereas mine is limited to urban areas. His derives from an analysis of the advantages of markets versus the political process for the provision of education, while mine is grounded more in democratic theory. He addresses the need to accommodate those who choose private schools for religious or other reasons, but since the major focus of his article is a critique of exit options, the details of his proposal are somewhat sketchy and hopefully I have been able to flesh them out more thoroughly. In particular, he does not discuss the implications of mandatory attendance for the question, addressed in Part V, of the extent to which school authorities may promote majoritarian values.

inner cities like Atlanta, Houston and New York City, while not in others such as Detroit.<sup>43</sup>

Second, the plan will not work if it induces white and middle to upper income families to flee to suburbia. While this happened during the integrationist push following *Brown*,<sup>44</sup> it might not be as pronounced this time around. White prejudice seems to have diminished over time, and whites seem more comfortable now with integration.<sup>45</sup>

Moreover, while the development of suburbia is proceeding apace, gentrification and the

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<sup>43</sup> Significant numbers of children attend private school in the United States. As of 2005, 12.8% of all students and 16.1% of white students attended private schools, while in the principal cities of metropolitan statistical areas the figures were 13.8% overall and 21.6% non-Hispanic white. Enrollment Below College for People 3-24 Years Old, by Control of School, Sex, Metropolitan Status, Race, Hispanic Origin: October 2005, Tables 5-1 & 5-3 available at <http://www.census.gov/population/www/socdemo/school/cps2005.html>. In addition, about 2.2% of all students and 2.7% of white students are homeschooled. National Center for Education Statistics, *Homeschooling in the United States:2003*, Table 2 available at [http://nces.ed.gov/pubs2006/homeschool/TableDisplay.asp?TablePath=TablesHTML/table\\_2.asp](http://nces.ed.gov/pubs2006/homeschool/TableDisplay.asp?TablePath=TablesHTML/table_2.asp). Since I have been unable to find precise data for particular cities on private school enrollment or the income levels of public versus private school students, it is necessary to extrapolate from the available data regarding population and public school enrollment. I assume that the school age populations of the various ethnic groups are proportionate to the groups' share of the overall population, and that the families of those attending private school are economically better off than of those attending public school. See Fairlie, *supra* note 18, at 6 (finding that family income is directly related to and a major determinant of who attends private school). In Detroit as of 2006 about 83% of the population was black and only 8% was white, while as of 2004 public school enrollees were about 91% black and 3% white. U.S. Census Bureau, American Fact Finder, 2006 Community Survey, Data Profiles, ACS Demographic and Housing Estimates available at [http://factfinder.census.gov/servlet/DatasetMainPageServlet?\\_program=ACS&\\_submenuId=datasets\\_1&\\_lang=en&\\_ts=](http://factfinder.census.gov/servlet/DatasetMainPageServlet?_program=ACS&_submenuId=datasets_1&_lang=en&_ts=) (extrapolated from gross numbers for Hispanic or Latino and Race); <http://www.detroitk12.org/data/dpsfacts>. Consequently, mandatory attendance would likely diversify Detroit's public schools only marginally. On the other hand, mandatory attendance might add considerably to the diversity of Atlanta's public schools, where the city's population in 2006 was about 35% white while the student population in 2007-08 was about 8% white. U.S. Census Bureau, *supra*; APS Fast Facts 2007-2008 available at <http://www.atlanta.k12.ga.us/content/aps/FastFacts07.pfd>. Likewise in Houston where the city's population in 2006 was about 28% white while in 2006-07 about 8% of the students were white. U.S. Census Bureau, *supra*; H.I.S.D. Facts and Figures, Feb. 2007 available at <http://www.houstonisd.org/HISDConnectEnglish/Images/PDF/FactsFigures07.pdf>. Likewise in New York City where the city's population in 2006 was about 35% white while the student population in 2006 was about 14% white. U.S. Census Bureau, *supra*; New York City Department of Education District Profile available at <http://www.broadprize.org/2007NewYorkBrief.pdf>.

<sup>44</sup> See *supra* note 19.

<sup>45</sup> See, e.g., HOWARD SCHUMAN ET AL., RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATION 103, 106-07, 123-25, 140-41 (1997) (reporting on opinion polls over the years showing increasing white support in principle for integrated schools and neighborhoods and decreasing reluctance to place their children in or to live in integrated settings; for example, in the mid 1990s 96% of whites supported integrated schools as against 50% in the mid 1950s, while white preference for all or mostly white neighborhoods declined from 69% to 43% between the early 1970s and mid-1990s).



revitalization of inner cities is bringing back whites and middle to upper income people for whom the lure of suburbia has diminished.<sup>46</sup> Many of the newcomers are younger professionals who have yet to start families. If they remain when they do, and if the gentrification trend continues, this might make a mandatory public school attendance plan viable.

Third, the plan's viability depends on its financial impacts. It will bring more students into the public school system, and thereby increase costs. However, state contributions to local school districts, which are generally based in great part on the number of students, may offset the increased costs. In addition, since those with children in private schools must now pay both tuition and property taxes to support public schools their children do not attend, they may be willing to support tax rate increases in order to augment the funding of public schools.<sup>47</sup> This money might be used to enhance the districts' educational programs, as I argue in Section IV may be necessary to make public school more desirable to the newcomers and to enable districts to equitably respond to the newcomers' educational needs. Increased taxes will also impact hard-pressed working class people. But they may be willing to pay more in return for the benefits of an enhanced and integrated educational program. Nevertheless, the likelihood of having to raise taxes suggests that a mandatory public school attendance plan may only be viable in

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<sup>46</sup> See *supra* note 8.

<sup>47</sup> The relationship between private school enrollment and public school expenditures has apparently not been widely studied. One study of New York State school districts (not including New York City) between 1983-93 concluded that enrollment in private schools does not cause a significant loss in taxpayer support of public schools. Don Goldhaber, *An Endogenous Model of Public School Expenditures and Private School Enrollment*, 46 J. URBAN ECON. 106 (1999). This does not necessarily mean that bringing private schoolers back into the public system would fail to produce increased expenditures for public schools. When parents move their children from public to private schools their incentive to support public schools decreases, but the more numerous families with students in public schools may still control the political decision of how much to tax and spend on public schools. On the other hand, when the private schoolers return, they and public schoolers who favor increased expenditures might coalesce and have enough political power to bring that about.



cities that have decent tax bases and are not so poor as to make tax increases unaffordable.

Finally, changes in state law may be necessary to authorize school districts to mandate attendance at public schools. In light of *Pierce*, most states have statutes exempting from their compulsory attendance laws children attending private school, and many exempt children being home schooled as well.<sup>48</sup> Depending on the wording, it might be possible to argue that these statutes do not preempt local ordinances mandating public school attendance.<sup>49</sup> Even so, local authorities will have to find a source of power authorizing the adoption of such ordinances. Home rule cities operating their own public school systems as city departments will have to and might successfully argue that the matter is of legitimate local concern because it affects the well-being of children living there, is not preempted by the state's compulsory attendance or other laws, and does not violate either the state or federal constitution.<sup>50</sup> Non-home rule cities or independent school districts will have to find authority in state enabling legislation, and will likely

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<sup>48</sup> See NATIONAL SURVEY OF STATE LAWS, Table 13 (Richard A. Leiter, ed. 2008); Patricia Lines, *Compulsory Education Laws and Their Impact on Public and Private Education* 28-29, 43-44 (December 1984) available at [http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content\\_storage\\_01/0000019b/80/2e/d8/ad.pdf](http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/2e/d8/ad.pdf).

<sup>49</sup> The argument might be that the exemption for private schools merely acknowledges that *Pierce* requires an exemption, is not intended to override local mandatory attendance ordinances if they are constitutional, and applies only to school districts without a mandatory attendance requirement.

<sup>50</sup> On the scope of cities' home rule powers, see, e.g., David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255 (2003) (discussing the history of the home rule movement and how as currently structured home rule fosters an urban-suburban divide, and recommending reforms that might spur inner cities and suburbs to undertake and coordinate anti-sprawl efforts and that would enhance their ability to do so); Richard Briffault, *Home Rule and Local Political Innovation*, 22 J.L. & POL. 1 (2006) (touting local freedom to innovate, noting the recent use of home rule powers to adopt local political reforms in the face of claims of state preemption, and discussing the implications of these successes for the ability of local governments to innovate in other ways). The next section presents the case for why, despite *Pierce*, a local mandatory public school attendance law satisfies the U.S. Constitution. A similar issue might arise under various provisions of state constitutions.

have difficulty doing so absent language granting them broad discretionary power in operating their school systems.<sup>51</sup>

Realistically, most state courts would likely require local school authorities wanting to experiment with mandatory public school attendance to get express authorization from the state legislature, and that may be hard to do. Nevertheless, I think the effort to get authorization, and the initiative to proceed without it if the legislature cannot be convinced, is worthwhile if only to arouse public attention. Minority and working class children in inner city America are being left behind educationally, current measures to address the problem (such as charter schools and No Child Left Behind) seem inadequate, and other possible solutions (such as school finance reform) are not now politically viable.

Moreover, there are merits to requiring public school attendance that other measures do not address. Education is supposed to be the great equalizer in a democratic society. But the overall education system of the United States today does just the opposite. Inner city children generally receive an inferior education compared to the better off children in suburban and private schools, thereby contributing to an increasingly hierarchical and rigid class structure that adversely affects all working class people and disproportionately disadvantages African Americans and other minorities.<sup>52</sup>

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<sup>51</sup> While home rule cities have the authority to define their powers for themselves within the limits of the home rule grant and subject to state preemption, non-home rule local governments have only those powers expressly conferred by state enabling legislation. In some states, courts narrowly construe enabling legislation to confine local powers. Absent such a bias, non-home rule cities or school districts would have to argue that state laws granting them the authority to operate public school systems should be broadly construed to empower them to enact mandatory attendance requirements even though the laws do not explicitly say so and even though state compulsory education laws expressly exempt private school attendees. That argument seems unlikely to succeed.

<sup>52</sup> See *supra* Part II.A.

Even if school finance reform were to come about and states were to provide equalized funding for public schools, the better off might depart from public schools en masse, resulting in a dual system of private schools with better education for the well off and public schools with less good education for the working class. The best way to equalize educational opportunity is to bring all children into a public school system that provides a quality education suited to the needs of all. Due to the diversity of their populations, some inner city school districts are uniquely positioned to do so.

### III. Does *Pierce* Stand in the Way?

In *Pierce v. Society of Sisters*,<sup>53</sup> decided in 1925, the Supreme Court overthrew an Oregon statute requiring all children to attend public school as violating the liberty of parents who wanted to place their children in sectarian and non-sectarian private schools “to direct the upbringing and education of children under their control.”<sup>54</sup> However, the case was decided long before the development of modern constitutional analysis, and although the Court has since cited *Pierce* approvingly,<sup>55</sup> it has never fully explained the case’s meaning in light of contemporary jurisprudence.<sup>56</sup>

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<sup>53</sup> 268 U.S. 510 (1925).

<sup>54</sup> *Id.* at 534-35.

<sup>55</sup> See, e.g., *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 166 (1944) (affirming *Pierce* as standing for a “private realm of family life which the state cannot enter”); *Griswold v. Connecticut*, 381 U.S. 479, 482-83 (1965) (reaffirming the principle of *Pierce*); *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (citing *Pierce* for the proposition that “the interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court”).

<sup>56</sup> For other critiques of *Pierce*, see, e.g., Liebman, *supra* note 42, at 305-06 (arguing that *Pierce* has been weakened by subsequent decisions upholding laws of general applicability that incidentally impact religious beliefs and by extension parental prerogatives, and that these decisions suggest that “a neutral prescription of public school or proscription of private school would serve a compelling state interest if parental exemption requests threaten the viability of the public school system”); Barbara Bennett Woodhouse, “*Who Owns the Child?*”: *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 997, 1017-29 (1992) (arguing that, while anti-Catholic and anti-foreign bias were prominent factors underlying Oregon’s law, so were class leveling, social harmony and inclusiveness, and that the Court’s opinion was animated not only by the values of religious liberty and pluralism but also by “a conservative attachment to the patriarchal family, to a class-stratified society, and to a parent’s property rights in his children”). For advocates of *Pierce*, see, e.g., Edward McGlynn Gaffney, Jr., *Pierce and*

The contemporary approach reviews laws under a rational basis test unless they affect suspect classes or fundamental rights, in which case heightened scrutiny of some type is employed.<sup>57</sup> In a rational basis case, the test is whether a law has a constitutionally legitimate purpose that a rational person could believe is furthered by the law, and ordinarily only a minimal amount of supportive evidence is required. In a suspect class or fundamental right case, the state must advance evidence showing a compelling or overriding justification for the law, there must be a strong fit between the asserted end of the law and the means of implementing it, and alternative approaches that would affect the class or right less drastically must be absent. This approach conforms to what has come to be seen as the Court's constitutionally appropriate role, which is to defer to the more politically responsible branches of government regarding questions of what best promotes the general welfare and to intervene only when the other branches overly impinge on rights protected by the Constitution.<sup>58</sup>

In *Pierce*, the Court did not discuss at all any of the justifications the state offered in its briefs and oral argument on behalf of the law. Divorced from historical context and

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*Parental Liberty as a Core Value in Educational Policy*, 78 U. DET. MERCY L. REV. 491, 511 (2001); Stephen G. Gilles, *On Educating Children A Parentalist Manifesto*, 63 U. CHI. L. REV. 937 (1996).

<sup>57</sup> See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 429-31, 447-59, 685-94, 1159-60 (2004).

<sup>58</sup> Compare, e.g., JOHN HART ELY, DEMOCRACY AND DISTRUST 87, 103 (1980) (advocating "a participation-oriented, representation reinforcing approach" to judicial enforcement of the Constitution, under which "the selection and accommodation of substantive values is left almost entirely to the political process and instead the document is overwhelmingly concerned, on the one hand, with procedural fairness in the resolution of individual disputes . . . , and on the other, . . . with ensuring broad participation in the processes and distributions of government"; and that the judiciary's role is to correct "malfunctions" in the political process, as when "the ins are choking off the channels of political change . . . or . . . representatives beholden to an effective majority are systematically disadvantaging some minority"); CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 123, 133, 142-43 (1993) (arguing that a constitutional commitment to "deliberative democracy" "helps to explain when an aggressive role for the Constitution is most appropriate . . . [and] why courts should usually be reluctant to intrude into politics"; that "[w]e should develop interpretive principles from the goal of assuring the successful operation of a deliberative democracy"; and that "the case for an aggressive role for courts is especially strong . . . [regarding] rights that are central to the democratic process and whose abridgement is therefore unlikely to call up a political remedy . . . [and] groups or interests that are unlikely to receive a fair hearing in the legislative process").

in the abstract, some of those justifications sound like things a person might reasonably believe would best serve society's welfare. The overall theme was that of assimilation and tolerance, both of which are important values for a viable democratic society. Requiring public school attendance was needed, said the state, in order to prevent "the rising tide of religious suspicions in this country . . . [resulting from] . . . the separation of children along religious lines during the most susceptible years of their lives,"<sup>59</sup> and in order to promote "the mingling together, during a portion of their education, of the children of all races and sects . . . [as] the best safeguard against future internal dissensions with the consequent weakening of the community against foreign dangers."<sup>60</sup>

These quite resemble the purposes of value inculcation and diversity that the Supreme Court has recognized as permissible. In *Bethel School District No. 403 v. Fraser*,<sup>61</sup> the Court held that school authorities could punish student speech clearly protected by the First Amendment in the adult world in the "interest in teaching students the boundaries of socially appropriate behavior."<sup>62</sup> And in *Grutter v. Bollinger*,<sup>63</sup> the Court held that as long as quotas or separate admissions tracks were not used, a law school's admission practices that took race into account served "a compelling interest in attaining a diverse student body" so as to promote "cross-racial understanding."<sup>64</sup> So without a suspect class or fundamental right to block the way, mandatory public school education likely passes the modern-day rational basis test, at least in its most deferential mode.

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<sup>59</sup> Gaffney, *supra* note 56, at 511 (2001).

<sup>60</sup> *Id.*

<sup>61</sup> 478 U.S. 675 (1986).

<sup>62</sup> *Id.* at 681.

<sup>63</sup> 539 U.S. 306 (2003).

<sup>64</sup> *Id.* at 328, 330.

The fundamental right for which *Pierce* has come to stand is the parental right to rear children as they see fit, absent a sufficiently strong countervailing interest of the community at large. For a strict constructionist, it would seem hard to find such a right in the Constitution. While this society has historically viewed parents as children's primary caretakers, there is no language in the document to suggest that this tradition is constitutionally sacrosanct.

Even a liberal approach to constitutional interpretation, willing to find rights in the Constitution that are implicit in a democratic society committed to individual liberty, should be hard-pressed to find parental prerogatives therein. Liberty claims are strongest when the impact on others or society at large is minimal or implausible, as with sex between consenting adults in the privacy of their homes.<sup>65</sup> But child rearing deeply implicates the well-being of parties who are not in a position to protect their own interests, a classic situation in which state intervention on their behalf is ordinarily thought justifiable. And, in fact, many laws impinge on parental prerogatives in the name of preventing child abuse or promoting children's best interests.<sup>66</sup>

Placing children in private school could not plausibly be claimed to amount to the abusive practices targeted, say, by child-labor or parental-neglect laws. But the rationale for required public school attendance seems reasonably close to that underlying

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<sup>65</sup> See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965) (striking down law criminalizing the use of contraceptive drugs or devices as violating fundamental right to privacy of married couples); *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down law criminalizing sex between persons of the same sex as violating the right to liberty protected by the Due Process Clause).

<sup>66</sup> See, e.g., *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 171 (1944) (law penalizing use of minors to sell magazines in streets and public places does not violate free exercise rights of Jehovah's Witnesses nor parental prerogatives protected by *Pierce* on the ground that "the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare"); *Santosky v. Kramer*, 455 U.S. 745 (1982) (parental custody may be irrevocably terminated on grounds of permanent neglect, but in light of parents' fundamental right to raise their children due process requires state to prove permanent neglect at least by clear and convincing evidence).

compulsory education laws – namely, to prepare children for adulthood in a society in which book learning is strongly related to people’s ability to function effectively as citizens and to succeed in life.<sup>67</sup> That compulsory education laws are permissible is clearly implicit in *Pierce*.<sup>68</sup>

One way of reading *Pierce* is as saying that the state has a compelling interest, to which fundamental parental prerogatives must give way, in assuring that children are educated, but not in dictating the manner of their education as long as the state’s interest is served. Absent a showing that other methods, such as private or home schooling, are inadequate, requiring all children to attend public school would not be tailored sufficiently narrowly.<sup>69</sup> But, as noted above, the state’s asserted interest in requiring public school attendance was not solely that children be educated, but that public schooling plays an important assimilative role in teaching tolerance and building a cohesive society.

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<sup>67</sup> While few would object today to having their children learn to read, there was opposition to compulsory education laws when first enacted in the latter part of the Nineteenth and early Twentieth centuries. Compulsory education was spurred by industrialization and immigration, and was opposed by farmers and the urban poor who “acted on their need for the proceeds from their children’s work to help their families survive and prosper.” WAYNE J. URBAN & JENNINGS L. WAGONER, JR., *AMERICAN EDUCATION: A HISTORY* 163, 163-165 (1996).

<sup>68</sup> *Pierce*, 268 U.S. at 534: “No question is raised concerning the power of the State . . . to require that all children of proper age attend some school.” And in *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (invalidating as violation of parents’ due process liberty rights law prohibiting the teaching of any subject in other than English in public or private school, while noting that “it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the states . . . enforce this obligation by compulsory laws”). And in *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (allowing the Amish on free exercise grounds to remove their children from public school after the 8<sup>th</sup> grade in order to raise them in the Amish way of life, while clearly implying that religious beliefs requiring children to remain illiterate would not withstand compulsory education laws).

<sup>69</sup> Whether home schooling is constitutionally protected has not yet been decided. While *Yoder* can be seen as a type of home schooling case, it is not clear that it would be extended beyond the context of a group seeking to live substantially apart from mainstream society and with a good track record. It might be argued that it should not be and that the state should be able to require attendance in an institutional setting of some type on the ground that all children should have the opportunity to interact with others during their schooling in order to prepare them to do so as adults and in the interest of promoting a cohesive and tolerant society, and on the ground that it would not be feasible to administer in the home schooling context regulations that *Pierce* acknowledges the state may adopt to ensure that children educated privately receive an adequate education.

While in theory it might be possible to achieve those objectives when children of different subcultures and social strata are educated separately, it is certainly plausible to think that interpersonal contact will contribute. In fact, there is substantial scientific evidence supportive of the so-called “contact hypothesis,” especially in structured environments like schools.<sup>70</sup> For courts to demand much more than that would elevate parental prerogatives to a level that would severely impede society’s ability to experiment with various ways to rear children. And it would prioritize parental prerogatives over the rights of children as individuals and of society as a whole.<sup>71</sup>

Parents clearly play a prominent role in rearing children in this society, and parental prerogatives is a widely shared value. However, so is the idea that children have rights as individuals to pursue their own destinies, and so is the idea that society as a whole has a legitimate interest in promoting the general welfare, and so too the idea that at times society may intervene in the parent-child relationship in order to protect

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<sup>70</sup> See, e.g., GROUPS IN CONTACT: THE PSYCHOLOGY OF DESEGREGATION (Norman Miller & Marjorie B. Brewer, eds. 1984) (a series of studies evaluating the conditions under which the ‘contact hypothesis’ holds true, and identifying as particularly important contact under egalitarian circumstances that minimize preexisting status differentials and enable cooperative behavior involving mutual interdependence and intimate interpersonal associations); Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. PERSONALITY & SOCIAL PSYCH 751, 766 (2006) available at <http://www.psych.umn.edu/courses/spring07/borgida/psy5202/readings/pettigrew%20and%20tropp%202006.pdf> (concluding, based on a meta-analysis of other studies, that “intergroup contact can contribute meaningfully to reductions in prejudice across a broad range of groups and contexts,” and that the impact is somewhat larger when those involved have no choice to avoid the contact and markedly higher in structured situations involving equal status among the participants, cooperative settings and support from background authorities); Linda R. Tropp & Mary A. Prenevost, *The Role of Intergroup Contact in Predicting Children’s Interethnic Attitudes* in INTERGROUP ATTITUDES AND RELATIONS IN CHILDHOOD THROUGH ADULTHOOD 236, 239 (S. Levy & M. Killen, eds. 2008) (concluding, based on a meta-analysis of other studies, that “school contact between youth from different groups corresponds with more positive intergroup attitudes”).

<sup>71</sup> Compare Anne L. Alstott, *Is the Family at Odds with Equality? The Legal Implications of the Egalitarian Family*, 82 S. CAL. L. REV. 1, 4 (2008) (arguing that a liberal egalitarian society, in order to reconcile a commitment both to parental prerogatives and equal opportunity for children, may on the one hand be required to support parental child-rearing so as to “attenuate the link between parents’ financial circumstances and children’s access to food, shelter, health care, and education,” and on the other hand may be entitled to impinge on parental prerogatives that impede equal opportunity such as by insisting that children attend public school).



children's individual rights and for the betterment of society. In the face of such problems as teen pregnancy, drug abuse and violence, the case for needed intervention is not hard to make.

There is no obviously best way to rear children, nor is it obvious that parents are better suited to the task than the state. But given the widespread belief in this society in parental prerogatives, society as a whole is not likely to intervene lightly in the parent-child relationship. Indeed, in light of the noted problems, one might well argue that over-adherence to that belief has led to too little intervention to the detriment both of children and of society as a whole.

This is the type of situation in which judicial deference to the political process is most called for, i.e., when important interests all of which are central to a thriving society and none of which is explicitly protected by the Constitution are at stake, when the political process is able to fairly take into account all those interests, when there is a legitimate and perhaps unresolvable debate about what the best move is, and when experimenting with various approaches will likely aid in deciding what to do. In short, the case for declaring parental prerogatives to be a fundamental constitutional right seems weak.<sup>72</sup>

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<sup>72</sup> Compare Gilles, *supra* note 56, forcefully arguing to the contrary. Gilles advocates constitutional protection for parental educational rights as in *Pierce*, *Meyer* and *Yoder* on the grounds that "parents are more likely to pursue the child's best interest as they define it than is the state to pursue the child's best interest as the state defines it . . . [because] parents have better incentives to act in their children's perceived best interests than do the state and its delegates, and will consequently be, on average, more faithful educational guardians." *Id.* at 940. In order to override parental prerogatives he would require states to show "that the parental educational choices with which they would coercively interfere are plainly unreasonable . . . in terms of basic human needs or essential liberal competencies." *Id.* at 944-45. Gilles acknowledges the state's interest in assuring that children receive "[a] basic education that equips the child to speak, read, write, calculate, and reason," *id.* at 952, and "that liberal states may legitimately promote allegiance to the core values and institutions on which they depend." *Id.* at 985. But since these objectives can be achieved by regulating the curriculum of private schools, he would obviously and emphatically oppose mandatory public school attendance. Even conceding that in general parents may be more likely than the state to look after their children's best interests, Gilles analysis overlooks the hierarchical character

This does not mean, however, that *Pierce* was wrongly decided on the merits. Also missing from the Court's decision is a discussion of the historical backdrop of the law mandating public school attendance. Since the law was adopted by referendum, there was no legislative history to help determine the true purpose of the law or the findings supportive of it. In such circumstances, examining the historical backdrop is especially important.

At the time, a substantial share of the population consisted of fairly recent immigrants. Without more, that would add plausibility to the assimilationist rationale asserted by the state. But also part of the historical backdrop was widespread anti-immigrant sentiment, especially against Catholics and those whose native language was other than English.<sup>73</sup> The Ku Klux Klan and other nativist groups campaigned for the law, and much anti-Catholic literature was distributed.<sup>74</sup> A state pamphlet accompanying the ballot attacked Catholic schools and the loyalty of Catholics to the country.<sup>75</sup>

This is the type of situation in which heightened judicial scrutiny is called for, not because parental prerogatives were at stake but because against the historical backdrop the law reeked of bias on the basis of religion and status against disfavored groups unable

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of education in this society and of the contribution thereto of the private school option. This hierarchy contravenes the principle of equitable sharing that I argue in the next section is a core democratic value, and that justifies if not requires impinging on parental prerogatives when necessary to equitably respond to the educational needs of all. Perhaps recognizing this issue, Gilles argues that to require parents who privately school their children to pay taxes to support public education violates parental prerogatives by effectively forcing those who can't afford to pay twice to opt for public school. *Id.* at 987-92, 1024-26. If a state-run universal voucher system could be designed to meet the dual objectives of enabling parents to guide their children's education and of providing all children with a comparable education in a non-hierarchical setting, this would weaken the argument for mandatory public school attendance. Until such time, the argument here is that for inner city school districts mandating public school attendance may be the only viable way to address the educational needs of all the children who reside there.

<sup>73</sup> Gaffney, *supra* note 56, at 503-07, 514-15.

<sup>74</sup> *Id.* at 506-07.

<sup>75</sup> *Id.* at 510

to protect their interests in the political process.<sup>76</sup> Under these circumstances the Court would have been justified in declaring the state's assimilationist rationale to be a smokescreen for discrimination and religious persecution, both of which the Constitution expressly prohibits. Although the Court didn't say this, this way of reading the case is most consistent with contemporary constitutional jurisprudence and the Court's appropriate role. Moreover, subsequent history vindicates the result. In fact, those against whom the law was directed have fully assimilated despite the private school option dictated by the Court.

Turning to the present, however, the case for allowing school districts to mandate public school attendance is much stronger, principally because of the absence of a discriminatory backdrop. It is implausible to think that those attending private schools or home schooling are a disfavored minority subjected to religious or status bias and unable to assert their interests in the political process. On the other hand, it is plausible to think that requiring public school attendance will benefit students and society as a whole, that such concerns are in fact the law's purpose, and that other alternatives are not available or viable.

The major benefit and the apparent purpose is to equalize educational opportunity, a right itself of arguable constitutional import,<sup>77</sup> as against a backdrop of demonstrably

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<sup>76</sup> Compare ELY, *supra* note 58, at 135-79 (on the judiciary's role in protecting disfavored groups against discrimination).

<sup>77</sup> Although the Supreme Court declined to declare education a fundamental right in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1972), it did intimate that at some point educational opportunities might be so unequal and inadequate as to be unconstitutional: "Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where-as is true in the present case-no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process." *Id.* at 37. While this statement falls far short of a full blown

unequal opportunity for society's least advantaged members. Moreover, there is evidence that racial and class integration works, that it improves the educational performance of the less advantaged without adversely affecting the performance of the more advantaged.<sup>78</sup> Finally, other possible options like reforming school financing and vouchers, while they may have some equalizing tendencies money-wise, are not as likely to contribute to racial and class integration and may even worsen the current situation.

In practice, requiring public school attendance may or may not be politically feasible and may or may not result in equalized educational opportunities. But the only way to find out is to allow communities wanting to experiment with it to do so, and the judiciary should not stand in the way.

#### **IV. Meeting the Educational Needs of All**

##### **A. The Principle of Equitable Sharing**

Requiring public school attendance will force students to leave private schools that they and/or their parents have chosen for religious or cultural or pedagogical reasons. At least in their opinion, such an experience meets their educational needs better than what public schools offer. In this section, I want to argue that public school authorities ought and may be constitutionally obligated to fairly respond to those perceived needs.

One reason they ought to is political. Requiring public school attendance to promote ethnic and class diversity and to improve a district's finances only makes sense

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right of equal educational opportunity, it nevertheless recognizes that there is something special about education and indicates that at some level of inequality the Court might intervene. This opens the door to the argument, if a system that provides basic minimal skills to some and not to others is impermissible, that the very reasons that underlie that conclusion support a full blown right of equal educational opportunity and that there is no principled way to stop short of that. In any event, it is clear that the state has a strong interest in promoting equal educational opportunity legislatively, as evidenced by laws designed to so ensure for women, the handicapped and non-native English speakers. A similar rationale, I argue, supports local laws mandating public school attendance.

<sup>78</sup> See KAHLENBERG *supra* note 5; McUsic, *supra* note 5; Rumberger & Palardy, *supra* note 5.

when significant numbers of students will be added to the system. If these folk vigorously oppose the requirement because they feel short-changed by it, they represent a voting bloc that may well be able to block adoption. As a practical matter, school districts will have to revamp their programs in response to the perceived needs of private school children in order to try to win their support or at least to blunt their opposition.

Secondly, democratic and constitutional principles mandate that public school authorities fairly respond to the educational needs of all their students, and especially so when public school attendance is mandatory. Government is inherently coercive. People are required to do things, like pay taxes or serve in the military, which they might choose not to do if they could avoid it. In a democratic society, particularly one that values individual freedom, the only justification for requiring people to participate when they don't want to is that they in fact benefit, if not from the particular project then on an overall basis from all of society's undertakings.<sup>79</sup>

Consequently, a principal of equitable and proportional sharing is central to democratic theory.<sup>80</sup> Without that, a society is effectively dictatorial or oligarchical even if all have the right to participate in decision-making. Without that, in the extreme, a unified majority could appropriate for itself indefinitely all or a disproportionate share of

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<sup>79</sup> Compare, e.g., Seyla Benhabib, *Toward a Deliberative Model of Democratic Legitimacy*, in DEMOCRACY AND DIFFERENCE 67, 69 (Seyla Benhabib ed., 1996) ("The basis of legitimacy in democratic institutions is to be traced back to the presumption that the instances which claim obligatory power for themselves do so because their decisions represent an impartial standpoint said to be equally in the interests of all"); ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 108 (1989) (advancing as democratic principles that "[t]he good of each member is entitled to equal consideration" and that "in general, scarce and valued things should be fairly allocated").

<sup>80</sup> Compare, e.g., DAHL, *supra* note 79, at 311-312 ("The close connection between democracy and certain kinds of equality leads to a powerful moral conclusion: If freedom, self-development, and the advancement of shared interests are good ends, and if persons are intrinsically equal in their moral worth, then opportunities for attaining these goods should be distributed equally to all persons. Considered from this perspective, the democratic process becomes nothing less than a requirement of distributive justice."); JOHN RAWLS, A THEORY OF JUSTICE 62 (1971) (advancing as a basic principle of social justice that: "All social values – liberty and opportunity, income and wealth, and the bases of self-respect – are to be distributed equally unless an unequal distribution of any, or all, of those values is to everyone's advantage").

the goods of social life to whose production a perpetual minority has been forced to contribute. This is exploitation and tyranny. From the perspective of the minority, which always loses, it is as if they had no right to participate in decision-making at all. Few, if any, would agree to such an arrangement unless they had no other viable choice, in which case their agreement would effectively be under duress and amount to an unconscionable bargain.<sup>81</sup> By extension, I assert, it follows that a bargain can only be democratic when all parties equitably and proportionately benefit, and that a society not practicing equitable sharing cannot legitimately claim to be fully democratic.

While a democratic society may not have to comply with the principle of equitable sharing with respect to every social good, public education is one such good. This is because the opportunity to receive a good education is so essential to one's ability to succeed in life and to one's development as a person.<sup>82</sup> Consequently, a public school

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<sup>81</sup> Compare, e.g., Melvin Aaron Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741 (1982) (identifying fairness and efficiency as the ethical force underlying the principle that people should be held to their bargains, arguing that bargains lacking in fairness and efficiency are consequently unworthy of full enforcement on grounds of unconscionability, and identifying as factors giving rise to unconscionable bargains the exploitation by one party of another's distress, bargaining incapacity and lack of knowledge); Jeffrey L. Harrison, *Class, Personality, Contract, and Unconscionability*, 35 WM. & MARY L. REV. 445, 447, 491 (1994) (arguing that "the private orderings of people who belong to a class-oriented society will passively, though relentlessly, reinforce the existing class structure," and that "[i]f one's consent to the terms of a contract is the function of class-based injuries, it is hard to defend the bargain on either fairness or efficiency grounds"; and advocating that courts excuse people from such contracts on the ground of "substantive unconscionability" as a means of redressing class-based power imbalances). Both Eisenberg and Harrison's articles address the question of unconscionability in the context of a market economy. I argue that a similar analysis applies to evaluating the fairness of the social contract implicit in democratic theory, that a social contract deriving from and perpetuating power imbalances is unconscionable and not fully democratic, and that a fair and democratic social contract requires equitable sharing. And I view mandatory public school attendance as a means to counteract power imbalances and promote equitable sharing.

<sup>82</sup> As most eloquently and famously put in *Brown v. Board of Education*, 347 U.S. 483, 493 (1954): "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

system that responds only or disproportionately to the educational needs of the majority is unfair and undemocratic. This is especially so if everyone must attend public school. Whether or not the ability to opt for privatized education lessens what equitable sharing requires of public schools, on the ground that people have other ways of meeting their needs,<sup>83</sup> the principle of equitable sharing is at its strongest when the government is the only provider of the service.

The particulars of what equitable sharing requires is open to debate. The debate is reflected currently in such issues as the extent to which school authorities must provide athletic programs for women,<sup>84</sup> special services for the handicapped,<sup>85</sup> bilingual

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Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”

<sup>83</sup> This argument is strongest when the choice between public and private school is fully free, but that is not the case in the United States today. Since those who opt for private school must also pay taxes to support public schools, the higher cost of the private school option undoubtedly prevents some and deters others from choosing it. They are in effect forced or induced into the public school system, and consequently have a comparable claim to equitable sharing as when attendance is mandatory. My view is that equitable sharing applies even to those who would opt for public school under conditions of fully free choice, both because they are in a sense induced into public school by whatever it is about the public school experience that leads them to choose it and because in principle equitable sharing is required of democratic institutions and especially of an institution as central to democracy as public education.

<sup>84</sup> See, e.g., *EQUAL PLAY: TITLE IX AND SOCIAL CHANGE* (Nancy Hogshead-Makar & Andrew Zimbalist, eds. 2007) (essays on the meaning and impact in relation to women’s participation in athletics of the prohibition against discrimination on the basis of sex in Title IX of the Education Amendments of 1972); RITA J. SIMON, ED., *SPORTING EQUALITY: TITLE IX THIRTY YEARS LATER* (2005) (articles on the history and theory of Title IX in relation to women’s participation in athletics); Deborah L. Brake, *Title IX as Pragmatic Feminism*, 55 CLEV. ST. L. REV. 513 (2007) (characterizing Title IX’s approach to women’s participation in athletics as a pragmatic one incorporating aspects of various feminist theories, and evaluating the merits and limitations of a pragmatic approach); Erin E. Buzuvis, *Survey Says . . . A Critical Analysis of the New Title IX Policy and a Proposal for Reform*, 91 IOWA L. REV. 821 (2006) (arguing with regard to women’s participation in athletics that a principle of “substantial proportionality” underlies Title IX and that the implementing regulations do not fully conform to that principle, and recommending modifications of the regulations to better further the proportionality principle).

<sup>85</sup> See, e.g., Robert Caperton Hannon, *Returning to the True Goal of the Individuals With Disabilities Education Act: Self-Sufficiency*, 50 VAND. L. REV. 715 (1997) (arguing with respect to the proper interpretation of IDEA’s requirement of a “free appropriate education” as applied to the mentally disabled that: “Each child requires unique care to reach a state of self-sufficiency. Unfortunately, society has demonstrated a general lack of commitment to provide funding and services necessary to address these unique needs. The focus of our concern and resources must shift toward providing children with mental impairments the skills they need to reach a state of independence.”); Michael A. Rabell, *Structural Discrimination and the Rights of the Disabled*, 74 GEO. L.J. 1435, 1452, 1456, 1470-80 (1986) (advocating a structural approach to evaluating claims of discrimination against the disabled in recognition of the fact that “the critical analytical problem of discrimination in the handicapped context now is . . . one of

education for non-native English speakers,<sup>86</sup> and equalized funding for poorer school districts.<sup>87</sup> I shall not attempt to specify in detail what equitable sharing will require when all must attend public school. Possibilities include all the ways in which private education differs from what public schools now provide. To mention a few, some of which may already be available in some locales: schools or programs offering specialized

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redesigning social structures and institutions to make them more responsive to the needs of the disabled segment of the population,” proposing a balancing test for “identifying priority areas for structural change . . . [and] delineating appropriate parameters for assessing claims within the identified priority areas,” and touting in the educational context a “commensurate opportunity standard” that balances the needs of the disabled against the opportunities provided to other children).

<sup>86</sup> See, e.g., Julie Chi-Hye Suk, *Economic Opportunities and the Protection of Minority Languages*, 1 J.L. & ETHICS HUM. RTS. 134 (2007) (arguing that liberal states should abet the preservation of minority languages through state funding of minority language instruction as a means of fostering individuals’ interest in establishing their personal identity, maintaining relationships with family, and participating in the lives of their ancestral communities); Thomas Kleven, *The Democratic Right to Full Bilingual Education*, 7 NEV. L.J. 933, 945 (2007) (arguing that school authorities are obligated to assist non-native English speaking students who want it to become proficient in their native languages pursuant to democratic principles implicit in the Equal Protection Clause and requiring that society “fairly and proportionately responds to the needs of all [its] members”); John Rhee, *Theories of Citizenship and Their Role in the Bilingual Education Debate*, 33 COLUM. J.L. & SOC. PROBS. 33 (1999) (examining the implications for bilingual education of civic republican, communitarian and liberal conceptions of democracy; characterizing civic republicanism as frowning on bilingual education in the interest of creating a common culture, communitarianism as favoring bilingual education as a means of maintaining group cultural identity, and liberalism as viewing it as an individual and family matter; and suggesting ways of accommodating the differing perspectives in designing a curriculum, including multi-cultural and dual-language programs for all students who want it, and that the issue is best resolved on the local level so as to foster responsiveness to differing views and needs).

<sup>87</sup> See, e.g., EQUITY AND ADEQUACY IN EDUCATION FINANCE (Helen F. Ladd et al, eds. 1999) (a series of articles on the varying views of courts and commentators on fairness in education finance); Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 40 VAND. L. REV. 101 (1995) (characterizing school finance litigation as focusing primarily on equalized funding and secondarily on educational adequacy, evaluating the strengths and weaknesses of the two approaches, arguing that the equalized funding approach has been stymied by resistance from the well-off who benefit from the existing scheme’s substantial reliance on local funding, and suggesting that focusing on ensuring the disadvantaged an adequate education is a more promising approach while recognizing that it will likely preserve the educational advantages of the well-off); Edward B. Foley, *Rodriguez Revisited: Constitutional Theory and School Finance*, 32 GA. L. REV. 475, 479 (1998) (arguing that a “principle of intrinsic equality” underlies the Equal Protection Clause and “guarantees all children of normal intelligence the opportunity to receive an education that prepares them for the rights and responsibilities of adult citizenship in a democratic society,” but that “as long as all children receive a certain minimum level of educational opportunity, the fact that some children receive better opportunities does not necessarily violate the principle of intrinsic equality . . . even if the educational inequalities are caused by inequalities in the taxable wealth of the local communities in which these children reside,” and that the principle of intrinsic equality is satisfied by requiring states to provide all children the opportunity to attain a high school level education). Recognizing that it is prohibitively expensive if not impossible to educate everyone up to their maximum potential, I would argue that as a general rule equitable sharing requires that all children receive a commensurate education relative to their individual capabilities, and that educational dollars be allocated accordingly.



vocational training, foreign language proficiency, Montessori or other alternative teaching methods.

In what follows, I propose in Part B a theoretical framework for addressing constitutional issues related to the question of what equitable sharing requires in the public school context. Section IV.C examines the implications of equitable sharing for the resolution of issues concerning religion in public schools, in particular school prayer and the use of religious materials. Section V examines the implications of equitable sharing for the extent to which school authorities may advocate particular secular views and attempt to inculcate them in students. Hopefully, this discussion will shed some light on how to resolve other issues of equitable sharing.

### **B. The Constitution and Equitable Sharing**

Initially the political process, taking into account public sentiment and political realities, will have to tackle the specifics of equitable sharing. Various considerations are relevant to the debate, including the types of educational needs asserted, the extensiveness of the demand, cost and other administrative practicalities. The judiciary also has a role to play if it is willing to do so. Since those who feel left out are likely to be in the minority, the judiciary may be needed as a check against unfair discrimination and majority unresponsiveness to minority needs. As argued in the prior section, this is the appropriate role of the judiciary in policing the political process.

Several constitutional guarantees are relevant to what equitable sharing requires in the public school context, in particular equal protection, freedom of speech and association, and the free exercise and non-establishment of religion. I argue that considered as a whole a principle of equitable sharing is implicit in these provisions.

Equal protection sometimes requires sameness of treatment, as when laws confer benefits on whites or men or the able-bodied to the exclusion of other races or women or the disabled.<sup>88</sup> This is related to the equitable notion that the opportunities of social life must be available to all on equal terms, unless there are sufficient reasons for treating some of society's members differently.<sup>89</sup> At other times equal protection requires responsiveness to difference, as when people of different ethnicities or genders have unique needs or when the disabled need special accommodations in order to benefit from services that all are entitled to.<sup>90</sup> This is related to the equitable notion of proportionality, meaning that all are entitled to share proportionately in the benefits of social life in accordance their needs.<sup>91</sup>

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<sup>88</sup> See, e.g., *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (zoning regulation requiring special permit for homes for the mentally retarded when other comparable group housing is permitted as of right violates equal protection); *U.S. v. Virginia*, 518 U.S. 515 (1996) (exclusion of women from Virginia Military Institute violates equal protection).

<sup>89</sup> For example, it seems clear that laws excluding youths from obtaining drivers licenses do not violate equal protection. The rationale for such laws is that in general youths do not possess the maturity to handle the responsibility of driving. That may be true, but as a generalization it excludes those youths who could demonstrate that in fact they are mature enough. A similar rationale was offered for excluding women from VMI, namely that in general women can't handle the school's rigorous training program as well as men, but was rejected on the ground that even if true it discriminates against those women who can and who deserve the same opportunity as men to demonstrate their capability. 518 U.S. at 540-46. Why the difference between women and youths? One possible explanation is that as a society we have come to see generalizations of gender incapacity as invidious and promotive of male dominance, whereas generalizations of youthful incapacity are seen as more benign.

<sup>90</sup> Since many issues of required responsiveness to difference are dealt with by statute, the Supreme Court has not addressed the matter thoroughly under the Equal Protection Clause. See, e.g., *Lau v. Nichols*, 414 U.S. 563 (1974) (Civil Rights Act of 1974's prohibition against discrimination based on national origin requires school authorities to take affirmative steps to rectify English language deficiencies of non-native English speaking students); *Cedar Rapids Community School District v. Garret F.*, 526 U.S. 56 (1999) (Individuals with Disabilities Education Act's requirement that school authorities furnish services designed to meet the "unique needs" of the disabled in order to assure them a "free appropriate public education" requires provision to student in wheelchair and on ventilator of related nursing services without which student would not be able to attend school).

<sup>91</sup> But compare *Board of Education v. Rowley*, 458 U.S. 176 (1982) (Education of All Handicapped Children Act's requirement of a "free appropriate public education" for the handicapped does not require an educational opportunity commensurate with other students but only services necessary to enable the handicapped to obtain "some educational benefit," such that sign-language interpreter need not be provided for deaf student receiving specialized instruction and performing above average). If that is a proper reading of the Act, I would argue it falls short of the principle of equitable sharing implicit in the notion of equal protection.

Administrative factors may at times impact the requirements of equal protection and equitable sharing, such as when the supply of social goods is (as it always is) limited, or when the cost of responding to particular needs is excessive relative to other needs,<sup>92</sup> or when in allocating access to social goods the difficulty of making individualized determinations warrants the use of generalizations that do not always fit.<sup>93</sup> But to protect against discrimination and disproportionate appropriation by the majority, the judiciary should be prepared to intervene when it appears that minority needs have been neglected without a sufficiently strong justification, for which the burden of proof may depend on the parties involved and the interests at stake.<sup>94</sup>

Freedom of speech and association require that, unless there are strong reasons to the contrary, all points of view are entitled to be aired and the adherents of all belief systems have the right to practice their beliefs.<sup>95</sup> Similarly, free exercise requires that all

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<sup>92</sup> Compare, e.g., *Cedar Rapids Community School District v. Garret F.*, 526 U.S. 66, 78 (1999) (holding that IDEA requires the provision of a ventilator and one-on-one nursing services to a wheelchair bound student, while noting that “the potential financial burdens imposed . . . may be relevant to arriving at a sensible construction of the IDEA”); *Irving Independent School District v. Tatro*, 468 U.S. 883, 892 (1984) (holding that catheterization services to student with spina bifida do not fall within the IDEA’s “medical services” exclusion, while noting as a legitimate justification for the exclusion its purpose “to spare schools from an obligation to provide a service that might well prove unduly expensive and beyond the range of their competence”).

<sup>93</sup> For example, a possible rationale for allowing generalizations regarding youthful immaturity, but not regarding the physical strength of women, is that the latter is easier to test out in individual cases whereas the former is difficult and thus administratively impracticable.

<sup>94</sup> For example, in general it is easier to defend gender than racial distinctions against an equal protection challenge, and even easier to defend distinctions based on youthfulness. This may be because racial distinctions are seen as largely irrational and likely to result from prejudice, whereas gender distinctions are seen at times as justifiable and gender bias as less prevalent, while treating youths differently is seen as even more legitimate and unlikely to result from bias. Thus, strict scrutiny tends to be used in race cases, whereas in gender cases some lesser or intermediate scrutiny is used, while rational basis governs as to the young. See *NOWAK & ROTUNDA*, *supra* note 57, at 694 (note 40), 734-35, 884-95.

<sup>95</sup> See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (invalidating Criminal Syndicalism Act banning advocacy of violence on ground that “the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”); *National Ass’n for Advancement of Colored People v. State of Alabama, ex rel. Patterson*, 357 U.S. 449, 460 (1958) (invalidating compulsion that NAACP reveal its members names and addresses on ground that in light of widespread racial hostility “the effect of compelled disclosure of the membership

have the right to express and practice their religious beliefs,<sup>96</sup> while non-establishment requires that the government pursue secular ends and neither favor nor disfavor religion.<sup>97</sup> These rights are particular instances of equitable sharing's requirement of equal opportunity.<sup>98</sup>

These First Amendment rights are all subject to the government's right to promote secular values that are integral to a democratic society and to regulate practices that mistreat others or undermine the general welfare.<sup>99</sup> However, lest the views of the majority overwhelm divergent secular and religious views, the government may override them only with strong justification, absent which democratic principles and equitable sharing mandate that the majority respect the right of others to hold ideas with which it disagrees and engage in practices of which it disapproves.<sup>100</sup>

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lists will be to abridge the rights of its rank-and-file members to engage in lawful association in support of their common beliefs”).

<sup>96</sup> See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (Amish's free exercise rights entitle them to remove children from school following eighth grade in order to raise them in Amish way of life, absent showing of harm to children and in light of Amish's favorable track record). But compare *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) (rejecting free exercise challenge to the denial of unemployment benefits to Native Americans who used peyote for religious purposes in violation of a generally applicable law prohibiting its use as a harmful drug).

<sup>97</sup> See, e.g., *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 792-93 (1973) (“A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of “neutrality” toward religion,’ favoring neither one religion over others nor religious adherents collectively over nonadherents”); *Everson v. Board of Education*, 330 U.S. 1, 18 (1947) (“[The First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them.”).

<sup>98</sup> Thus, there is a strong overlap among these constitutional principles in terms of what democratic principles and equitable sharing require. Even without the Free Exercise Clause, the Free Speech Clause could easily be read to protect religious as well as other types of associations. And even without the First Amendment, the Equal Protection Clause could easily be read to prevent the government from discriminating against, and to require accommodations for, all secular and religious belief systems.

<sup>99</sup> See *infra* Part V.

<sup>100</sup> Compare, e.g., Linda C. McClain, *Toleration, Autonomy, and Governmental Promotion of Good Lives: Beyond “Empty” Toleration to Toleration as Respect*, 59 OHIO ST. L.J. 19, 23-24 (1998) (advocating a model of “toleration as respect” that “aims to secure more than pale civility or grudging toleration by appealing to the protection of such goods as autonomy, moral independence, and diversity and through seeking to assure mutual respect and civility among citizens . . . [but] does not serve as a prophylactic bar on government's pursuit of a formative project to foster citizens' capacities for self-government and to promote values. Rather, it insists upon reason-giving in the deliberative process and upon careful scrutiny

The foregoing attempts to set forth a general framework for analyzing the requirements of equitable sharing in the public school context. To illustrate how this might play out in practice, I discuss in the next part the separation of church and state. This has been a hotly contested issue before the Supreme Court, and the controversy is likely to intensify if all children are required to attend public school.

### **C. Equitable Sharing and Accommodating Religion**

Mandatory public education will force into the public schools many who now attend parochial schools because they want exposure to religion in their studies.<sup>101</sup> They may want to worship during the school day, to learn the Bible or other sacred texts, to study creationism along with or instead of evolution, or to experience other aspects of a religiously-oriented education. If none of this is provided, they are likely to argue that forcing them into the public schools deprives them of the opportunity to incorporate what they believe their religion requires as part of their education, thereby violating their free exercise rights under the Constitution.<sup>102</sup> On the other hand, if these services are provided, the opponents are likely to argue that so doing violates the Establishment Clause.<sup>103</sup>

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of the reasons for which government acts and of the ends it seeks to pursue.”); IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 191 (1990) (“[T]he ideal of the just society as eliminating group differences is both unrealistic and undesirable. Instead justice in a group-differentiated society demands social equality of groups, and mutual recognition and affirmation of group differences.”).

<sup>101</sup> Likewise many who now attend secular private schools because they want exposure to ideas conveyed there and not in public schools. To the extent that equitable sharing principles emanating from the Constitution’s religion clauses require or permit public schools to accommodate religious beliefs, equitable sharing principles emanating from the free speech and equal protection clauses require or permit comparable accommodations for all belief systems. In the interest of space and because religion is such a hot issue, the discussion here focuses on religious accommodations. A similar analysis will apply to other types of accommodations. *See, for example, supra* notes 84-87.

<sup>102</sup> *See, e.g.,* *Mozert v. Hawkins County Board of Education*, 827 F.2d 1058 (6<sup>th</sup> Cir. 1987) (rejecting claim that required exposure to material contrary to students’ religious beliefs violates their free exercise rights).

<sup>103</sup> *Widmar v. Vincent*, 454 U.S. 263, 270-75 (1981) (rejecting claim that allowing student religious groups to use University’s facilities made available to non-religious groups would promote religion in violation of the Establishment Clause).

This, of course, has been a long-standing issue before the Supreme Court, which has set some guidelines as to the extent to which religion must, may or may not be part of the public school program. Religion must be a part when the Free Exercise Clause requires it, may not be a part when the Establishment Clause forbids it, and may be a part when the Establishment Clause permits it although the Free Exercise Clause does not require it. The basic principle regarding the intersection of the Free Exercise and Establishment Clauses is that of neutrality, meaning that the government may neither favor nor disfavor religion, neither promote nor denigrate it.<sup>104</sup> From this it follows that there need not, and indeed may not, be a total wall of separation between church and state; and that government may, and at times must, accommodate people's religious beliefs just as with but no more nor less than people's secular beliefs.<sup>105</sup> This is the appropriate stance in terms of democratic principles and the principle of equitable sharing.

The status of the law today is as follows: (i) School authorities may not mandate or participate in their official capacities in formal prayer.<sup>106</sup> On the other hand, they may mandate moments of silence during which students are free to pray as long as school

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<sup>104</sup> See *supra* note 97.

<sup>105</sup> Compare, e.g., Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 104 U. PA. L. REV. 555, 558, 592 (1991) (arguing that special accommodations for religion not mandated by the Free Exercise Clause violate the principle of "equal religious liberty" underlying the Constitution's religion clauses, and that "religious association cannot be preferred to nonreligious counterparts" on the basis of an overarching constitutional principle of "equal associational liberty").

<sup>106</sup> *Engel v. Vitale*, 370 U.S. 421 (1962) (invalidating as violating Establishment Clause state prescribed prayer at beginning of school day from which those not wishing to participate were excused); *Abington School District v. Schempp*, 374 U.S. 203 (1963) (same re required reading from Bible); *Lee v. Weisman*, 505 U.S. 577 (1992) (invalidating prayers as part of formal graduation ceremonies); *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000) (invalidating student-led prayers at high school football game).

officials do not encourage them to do so.<sup>107</sup> From this it follows that students may pray informally on their own.<sup>108</sup> (ii) School authorities may not be banned from teaching the theory of evolution,<sup>109</sup> nor be required to teach creation science along with evolution,<sup>110</sup> nor be required to post the Ten Commandments in classrooms.<sup>111</sup> However, they may use relevant religious materials for secular purposes in literature, history and other classes.<sup>112</sup> (iii) Equal time laws requiring school authorities that allow extracurricular activities also to allow comparable religious activities are valid.<sup>113</sup> Even absent such laws, school authorities may have to allow equal time.<sup>114</sup> But if school authorities do not allow such activities at all, then presumably they may exclude religious activities along with all the others.<sup>115</sup>

All these results are arguably consistent with the generally neutral stance toward religion that the Court has taken and that democratic principles require. However, once children must attend public school, and perhaps at times even without that, neutrality and proportionality may require or at least permit accommodations to religion that the law

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<sup>107</sup> *Wallace v. Jaffree*, 472 U.S. 38, 59 (1985) (striking down mandatory moment of silence law expressly stating that it was for “meditation or voluntary prayer,” while acknowledging students’ “right to engage in voluntary prayer during an appropriate moment of silence”).

<sup>108</sup> 472 U.S. 67, 67 (Justice O’Conner, concurring) (“Nothing in the United States Constitution as interpreted by this Court . . . prohibits public school students from voluntarily praying at any time before, during, or after the schoolday”).

<sup>109</sup> *Epperson v. Arkansas*, 393 U.S. 97 (1968).

<sup>110</sup> *Edwards v. Aguillard*, 482 U.S. 578 (1987).

<sup>111</sup> *Stone v. Graham*, 449 U.S. 39 (1980).

<sup>112</sup> *Abington School District v. Schempp*, 374 U.S. 203, 225 (1963) (“Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment”); *Stone v. Graham*, 449 U.S. 39, 42 (1980) (“This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like.”).

<sup>113</sup> *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990) (upholding federal Equal Access Act).

<sup>114</sup> *Widmar v. Vincent*, 454 U.S. 263 (1981) (invalidating as violation of free speech university prohibition of student use of facilities for religious purposes while permitting use for other purposes).

<sup>115</sup> *Id.* at 267-68 (“The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place”).

does or may not now allow. But in light of the non-establishment principle, these accommodations may not treat religious ideas and activities more favorably than secular ones.<sup>116</sup> As examples, the following discusses school prayer and the use of religious materials for secular educational purposes.

First, that students are free to pray on their own should be interpreted to mean that they may congregate in common areas in non-class time for the purpose of group prayer either silently or out loud, as long as they do not attempt to coerce other students to participate.<sup>117</sup> So as to equitably share available space and prevent interference with other student activities, school authorities should be permitted to designate areas for organized prayer.<sup>118</sup> If the demand is great and common areas inadequate, school authorities should be required where practicable to allow students to assemble in classrooms or auditoriums to pray when those areas are not being used for instruction or other school events. To preserve neutrality and equitable sharing, students wishing to congregate for other comparable purposes like political or philosophical discussion must be similarly accommodated. If the demand for all such activities exceeds available facilities or impinges on the educational program, then school authorities may set aside reasonable periods for the activities and may allocate facilities in some fairly proportionate way.<sup>119</sup>

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<sup>116</sup> And in light as well of the right of a democratic society to promote democratic values, there are times when religion may be treated less favorably than secular values as long as religious values are not intentionally denigrated. See *infra* Section V.

<sup>117</sup> For example, prior to the first bell students assembled to pray around the flag pole in front of the public high school our son attended. And at the law school where I teach students assemble in the lobby to pray at the start of the day.

<sup>118</sup> This is akin to reasonable time, place and manner restrictions on free speech activities.

<sup>119</sup> All this would equally follow if public schools were declared to be limited public forums under the First Amendment, which may be appropriate once all are required to attend public schools. While the law now regards public schools as limited public forums only when they voluntarily become such, I am tempted to argue that the First Amendment so requires at least with respect to students.



It is true that the mere presence on campus of religious activities may influence other students, that the government's allowance of the activities may thus have the effect of aiding religion, and that compulsory attendance laws may compound the impact by creating a somewhat captive audience. But student interaction in and out of class is likely to influence views on all types of matters, and indeed the exposure to and exchange of ideas is one of the purposes of public education in a democratic society. Some may turn toward religion and others away, and consequently in the one instance school authorities will have aided and in the other hurt religion. But as long as school authorities maintain neutrality, the effect either way will be incidental to the constitutional and democratic requirement to equitably respond to the needs of all students.

The risk of infringing establishment concerns seems less severe with older students who may be less susceptible to peer pressure and more skeptical of authority figures, and with more heterogeneous student bodies where various points of view are at play and public sentiment is more likely to impede school authorities from promoting religion than in locales where particular religions dominate. Consequently, at the elementary school level and in more homogeneous settings, there may be a greater need for judicial oversight of the process to ensure that school authorities do not advocate religion and are not seen as doing so. For example, in heterogeneous settings perhaps school authorities should be allowed to permit ministers and other outsiders to participate in student religious and secular activities, whereas in homogeneous settings perhaps not due to the greater likelihood of purposeful promotion and the greater appearance of government advocacy when the only outsiders on campus are religious figures. Or perhaps so even in homogeneous settings, since this would then replicate somewhat in the

public school system the choice people currently have of choosing a private school in order to obtain a more religiously oriented education, only now they would have to move to a more homogeneous locale in order to obtain it.

The second example is of the use of religious materials for secular educational purposes. From the foregoing discussion, it follows that this is in keeping with democratic values and should, therefore, be permitted and arguably required. A principal purpose of public education in a democratic society is to expose students to a wide range of ideas so that they will be better able to understand the world, think for themselves as adults and contribute to society's advancement. For good or bad religion has played a prominent and at times dominant role in history and the development of ideas. Not to expose students to this role is to impoverish their education and undermine this educational purpose.

This point holds true in all areas of study including, for instance, the theory of evolution. It enhances knowledge to understand that there are both scientific and non-scientific explanations for the origin of life. Indeed, it enhances one's understanding of the scientific method, and may thereby even undermine the religious point of view. If the religious view may be presented in a history class incident to studying the clash of secular and sectarian ideas, or in an English class incident to studying how to interpret and deconstruct great literature, then there is no good reason to exclude religious or other non-scientific views of the origin of life from a biology class. Given time limitations and the wealth of materials available in all fields of study, school authorities are due substantial discretion in their selection of materials. However, to categorically exclude

religious materials from an area of study just because they are religious and without fairly evaluating their pedagogical merit is to disfavor religion and depart from neutrality.

Nor should *Edwards v. Aguillard*,<sup>120</sup> which invalidated as an establishment of religion a state law mandating that creation science be taught alongside evolution, be read to prohibit the teaching of non-scientific views of human origin. *Edwards* was rightly decided because the obvious purpose of the law was to promote a particular religious point of view and to remove from the hands of school authorities and professional educators the decision as to the most appropriate way to teach biology in light of public sentiment and pedagogical theory. Since lay and professional opinions are likely to differ, the most democratic response is to allow a variety of approaches for teaching biology as among and within school districts and schools. In a large urban high school with several biology sections, the best way to enable various pedagogies and meet everyone's educational needs might be to have some sections that incorporate non-scientific explanations of the origin of life and some that do not. *Edwards'* invalidation of a state legislature's attempt to impose religious orthodoxy on the teaching of biology should not be interpreted to stand in the way.

One more example. If the Bible may be studied as literature or for its historic significance, may there be a class devoted entirely to the Bible for such purposes? For reasons discussed in the next section, attendance at such a course could not be mandatory. But on a voluntary basis it may at times be permissible as part of an effort to equitably respond to all students' educational needs. However, due to the singular focus on the Bible, the course should be subject to intensive judicial scrutiny to ensure that the

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<sup>120</sup> 482 U.S. 578 (1987).

asserted secular purpose is not a smokescreen for promoting religion.<sup>121</sup> Relevant factors include whether the material is presented in a manner advocating belief in the ideas contained therein or in an academic manner consistent with the pedagogy of the secular field of study on which the course is based, and whether school authorities have equitably responded to the desire of others for comparable courses based on particular texts.<sup>122</sup>

## **V. Democratic Principles and the Advocacy of Secular Values**

Mandatory attendance will likely bring into public schools children whose families chose private schools because they felt the message public schools convey is contrary to their religious or philosophical beliefs. This raises the question of the extent to which school authorities may promote values, particularly those of the majority, and may encourage students to adopt them as their own. This question pertains even absent mandatory attendance, since there may be many who disagree with the public schools' message yet opt to attend because they cannot afford private school or prefer public over private schooling for other reasons. But the question is especially poignant with mandatory attendance because now the contention that school authorities are impermissibly taking advantage of students as a captive audience in order to indoctrinate them is at its strongest.

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<sup>121</sup> See, e.g., Ralph Blumenthal & Barbara Novovitch, Bible Course Becomes a Test for Public Schools in Texas, New York Times, August 1, 2005 *available at* <http://www.nytimes.com/2005/08/01/education/01bible.html?scp=2> (discussing a course on the Bible developed by the National Council of Bible Curriculum in Public Schools and used by as many as 1,000 high schools in the nation, touted by the National Council as being within constitutional guidelines and criticized by others as promoting religion); Frances R. A. Paterson, *Anatomy of a Bible Course Curriculum*, 32 J. LAW & EDUC. 41 (2003) (discussing cases litigating the constitutionality of Bible study courses, concluding that the National Council's course promotes a conservative evangelical Protestantism in violation of the Establishment Clause, and recommending guidelines for school districts to follow in evaluating material for proposed Bible study courses to ensure their legitimacy as secular academic classes).

<sup>122</sup> The Qur'an, for example. Otherwise, school authorities would be favoring Christians over Muslims in violation of their obligation to equitably respond to the needs of all students.

Consequently, it might be argued that school authorities must always remain fully neutral as among competing points of view.<sup>123</sup> With regard to religious views the argument is that since the authorities may not establish religion, then neutrality requires that they not promote views that conflict with students' religious beliefs because that would amount to disestablishing religion or infringing their free exercise rights.<sup>124</sup> With regard to competing secular views the argument would be that a requirement of neutrality is implicit in the concept of free speech, that neutrality demands that all ideas are entitled to be held and expressed, that an open and on-going public dialogue is the only permissible way to determine which views will predominate from time to time, and that school authorities may not bias the dialogue by weighing in on one or the other side.

As a practical matter, though, the government cannot avoid promoting values, and consequently cannot remain fully neutral. Thus, to pass laws, to explain their rationale to the public, and to carry out those laws is to promote the values underlying those laws. Likewise, whatever the design of a school curriculum, it will at least implicitly promote some values, if only those reflected in the unavoidable choices that must be made of what to include and what to omit. Even the choice not to take a position promotes the idea that there is merit in not doing so. So the question is not whether the government may promote values, but what values it may promote and under what conditions.

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<sup>123</sup> Compare, e.g., BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 139, 155-56, 158 (1980) ("A system of liberal education provides children with a sense of the very different lives that could be theirs-so that, as they approach maturity they have the cultural materials available to build lives equal to their evolving conceptions of the good"; "[The] mission [of liberal schooling is] to provide the child with access to the wide range of cultural materials that he may find useful in developing his own moral ideals and patterns of life"; "As the child gains increasing familiarity with the range of cultural models open to him in a liberal society, the choice of his curriculum should increasingly become his responsibility, rather than that of his educators").

<sup>124</sup> See *Mozert*, *supra* note 102; *Smith v. Board of School Commissioners of Mobile County*, 827 F.2d 684 (11<sup>th</sup> Cir. 1987) (rejecting claim that home economics, history and social studies textbooks violate Establishment Clause by advancing a religion of secular humanism and excluding coverage of Christianity).

Here, it is necessary to distinguish the roles of the political process and the educational system in a democratic society. While law making is inherently value-laden, democratic principles require that both before and after laws are passed there be a fair opportunity to express all competing views regarding their merits in legislative and other public forums. Likewise, democratic principles require an open and on-going public dialogue regarding all of society's values.<sup>125</sup> One of the purposes of public education in a democratic society is to enable children to understand and participate in the public dialogue as adults.<sup>126</sup> That purpose may be perverted when school authorities take advantage of their status as authority figures to promote debatable values before a captive audience of impressionable children.<sup>127</sup>

An argument to the contrary is that a democratic society has the right to preserve itself as such, and toward that end may promote democratic values among its people

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<sup>125</sup> Compare, e.g., DAHL, *supra* note 79, at 109 ("Throughout the process of making binding decisions, citizens ought to have an adequate opportunity, and an equal opportunity, for expressing their preferences as to the final outcome. They must have adequate and equal opportunities for placing questions on the agenda and for expressing reasons for endorsing one outcome rather than another."); JOHN RAWLS, *POLITICAL LIBERALISM* 217 (2005) (arguing with regard to matters of basic justice that democratic principles impose on citizens a "duty of civility-to be able to explain to one another on those fundamental questions how the principles and policies they advocate and vote for can be supported by the political values of public reason. This duty also involves a willingness to listen to others and a fairmindedness in deciding when accommodations to their views should reasonably be made.").

<sup>126</sup> Compare, e.g., AMY GUTTMAN, *DEMOCRATIC EDUCATION* 42 (1987) ("[A] democratic state recognizes the value of political education in predisposing children to accept those ways of life that are consistent with sharing the rights and responsibilities of citizenship in a democratic society. A democratic state is therefore committed to allocating educational authority in such a way as to provide its members with an education adequate to participating in democratic politics, to choosing among (a limited range of) good lives, and to sharing in the several subcommunities, such as families, that impart identity to the lives of its citizens."); MEIRA LEVINSON, *THE DEMANDS OF LIBERAL EDUCATION* 102-103 (1999) ("Future citizens must be taught to exemplify the virtues characteristic of a liberal democracy . . . to respect and value the democratic process, . . . to think critically and carefully . . . [and] to tolerate and respect other citizens and their differences").

<sup>127</sup> See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) ("Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary. . . . The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure.").

generally and in particular during the educational process so that students will respect those values as adults. Further, that in promoting democratic values the government may favor them over competing religious or secular views, as long as it does not denigrate other belief systems in their entirety. A democratic society is certainly obligated to make room for all belief systems compatible with democratic values. But suppose some religious or philosophical views are undemocratic, for instance because they advocate dictatorship or a religious state that only allows the practice of the official religion. Must the expression of those views be allowed? If so, may the government promote democratic values and argue against non-democratic values of religious or other origin?

Certainly a democratic society may prohibit armed insurrection designed to overthrow it. However, as a practical matter a society is not likely to remain democratic for long if most people no longer believe in democracy and are able to use the democratic process to eliminate it. Restricting the right to vote to those who believe in democracy does not seem feasible and would be inconsistent with democratic principles. So, in general, would it be to prohibit the expression of anti-democratic views, although that might well work to preserve democracy. Perhaps democratic principles would permit restraints on undemocratic expression in the aftermath of a dictatorial era or in the face of imminent insurrection. However, democracy is so committed in principle to free speech and open discussion that the expression and even advocacy of undemocratic views must ordinarily be permitted as a risk inherent in what it means to be a democratic society.<sup>128</sup>

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<sup>128</sup> Compare, e.g., LEE C. BOLLINGER, *THE TOLERANT SOCIETY* 120 (1986) (arguing that the impetus behind the protection of extremist speech, in addition to its relationship to the search for truth and the protection of the politically weak, is at heart its symbolic function in countering a psychic impulse to excessive intolerance in social interactions: “[T]he purposes of the free speech enterprise may reasonably include not only the ‘protection’ of a category of especially worthy human activity but also the choice to exercise extraordinary self-restraint toward behavior acknowledged to be bad but that can evoke feelings that lead us to behave in ways we must learn to temper and control.”); RAWLS, *supra* note 125, at 340-56,

One might argue, then, in the educational context that democratic principles require school authorities to present both democratic and non-democratic values for students' edification and not to take a position on the matter. This is not the status of the law today. Rather, school authorities may attempt to inculcate in students secular values deemed essential to a democratic society.<sup>129</sup> But they may not do so in a way that requires students to profess a belief in things in which they do not believe or choose not to profess to believe.<sup>130</sup>

Moreover, it is unrealistic to expect any society to refrain from promoting values that are integral to its very existence. But a democratic society may go no further than promoting the merits of democracy and still remain true to the democratic value of open discourse. In promoting democracy, society must respect the right of dissenters to express their views and must rely on persuasion rather than indoctrination.<sup>131</sup>

Indoctrination is undemocratic because, in seeking to gain adherence through unquestioning acceptance of ideas rather than through reasoned and open discourse, it is a

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348, 354 (arguing that the advocacy of subversive views must ordinarily be protected because such speech invariably raises questions about the justice of society's basic structure that democratic principles require be addressed through the free and informed public use of reason, that subversive advocacy may be restricted only "when it is both directed to inciting imminent and unlawful use of force and likely to achieve this result" and only when there exists "a constitutional crisis in which free political institutions cannot effectively operate or take the required measures to protect themselves," and that such a situation has never existed in the history of the United States).

<sup>129</sup> *Ambach v. Norwick*, 441 U.S. 68, 76, 77 (1979) (recognizing "[t]he importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests," and the role of public schools "as inculcating fundamental values necessary to the maintenance of a democratic political system"); *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (upholding against free speech challenge punishing student for lewd speech at a school assembly on the basis of "society's countervailing interest in teaching students the boundaries of socially appropriate behavior. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences.")

<sup>130</sup> *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (compulsory participation in Flag Salute on threat of expulsion for non-compliance violates students' free speech rights).

<sup>131</sup> *West Virginia State Board of Education v. Barnette*, 319 U.S. at 640, 642 (public authorities may not "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein," while noting that "[n]ational unity as an end which officials may foster by persuasion and example is not in question").



form of coercion inconsistent with the core democratic value of freedom of belief and conscience.

Therefore, school authorities may not as a means of promoting patriotism require students, who for religious or philosophical reasons object, to pledge their allegiance to the society because to force them to profess something they do not believe or choose not to profess is undemocratic and violates freedom of conscience.<sup>132</sup> Nor should the authorities be allowed to conduct allegiance services on a voluntary basis, both because of the coercive impact when the state is the organizer on students who don't want to participate and because pledging allegiance is indoctrination and not persuasion based the merits of the idea.<sup>133</sup> On the other hand, mandatory classes in which the merits of democracy are advanced should be permissible, as long as they are conducted in a manner open to differing views of what democracy consists and of its merits. Nor may students be denigrated for expressing contrary views, nor may they be graded based on their willingness to profess a belief in democracy.<sup>134</sup>

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<sup>132</sup> *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (invalidating compulsory flag salute).

<sup>133</sup> Thus, I argue that *Barnette* was wrong in implicitly sanctioning a state-mandated voluntary flag salute as a means of fostering patriotism, although as with prayer democratic principles require that students who wish to salute the flag be allowed to do so on their own.

<sup>134</sup> Compare Stephen E. Gottlieb, *In the Name of Patriotism: The Constitutionality of 'Bending' History in Public Secondary Schools*, 62 N.Y.U. L. REV. 497, 537, 557, 563 (1987) (advocating, as a way to balance the democratic principle of "equality of ideas" as protected by the First Amendment and the government's interest in inculcating democratic values, a "fairness doctrine" that would require schools to "expose students to different viewpoints on controversial issues," while acknowledging that "not all value inculcation is objectionable, but only inculcation that takes sides among competing positions"); Susanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 157, 171, 176 (1995) (advocating "education for republican citizenship" that consists of "moral character, critical thinking, and cultural literacy" and includes teaching students such values as "hard work, honesty, careful thought, individual responsibility, treating others with respect and tolerance" and inculcating in students "the inclination to act responsibly and in accord with basic cultural norms"). The devil is always in the details in these matters, and it is not entirely clear to me when Gottlieb would allow value inculcation and when not nor of what the basic cultural norms of which Sherry speaks consist. If value inculcation is impermissible whenever there are competing positions, that may always be the case and no inculcation would then be permissible. If basic cultural norms consist of all widely and traditionally held values, that could extend far beyond core democratic values and allow school authorities to attempt to convince

This compromise affirms the interest of the society in maintaining democracy while also protecting the freedom of thought and expression that is itself a core democratic value. It is true, when teachers advocate the merits of democratic values, that there may a coercive impact on the willingness of students who disagree to speak out or on students who are susceptible to unquestioning acceptance of authority figures. Since coercion is especially problematic with children who are a captive audience, teachers must encourage students to feel free to speak out when they have questions and to respect the right of others to disagree. This will not eliminate the coercive impact, and consequently the compromise tilts the balance in favor of the society's interest in maintaining democracy. There is no escaping the advantage of prevailing ideas in public discourse, nor the courage it takes to confront them.

Finally, while the democratic values society has the right to promote are wide ranging – including the value of democratic institutions, open debate, freedom of conscience, tolerance, and others – it does not have the right without strong justification to promote other beliefs that are not central to what it means to be a democratic society.<sup>135</sup> The majority may not use the power of government to promote some values over others just because they are its values,<sup>136</sup> because that would amount to the

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students to adopt the majority's view of the good life. Probably there is no way of avoiding vagueness in articulating the line school authorities may not cross. My approach would be to allow school authorities to promote general principles deemed essential to democracy, such as the value of free speech and open debate and of respecting people's right to determine their own destinies, while requiring school authorities to take a more neutral stance as to what those general principles mean in particular contexts.

<sup>135</sup> Compare LEVINSON, *supra* note 126, at 144 (arguing that the overriding goal of education in liberal society is to foster children's "capacity for autonomy" as adults, that the teaching of civic virtues is essential to the maintenance of a liberal society, but that beyond that "schools should not attempt to advance or to shape themselves in accordance with fundamental or divisive conceptions of the good").

<sup>136</sup> The Court appears to suggest the contrary in *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853 (1982), which held that school authorities may not remove books from school libraries simply to deny students access to ideas with which they disagree, when in dictum the plurality opinion says: "We are therefore in full agreement with petitioners that local school boards must be permitted 'to establish and apply their curriculum in such a way as to transmit community values,' and that

disproportionate appropriation of a public good, i.e., the government, whose benefits must be equitably shared by all.<sup>137</sup> This is the core idea, for example, behind the Establishment Clause's prohibition against favoring particular religions or religion in general.

This point has implications for the design of a curriculum and teaching methodology. Consider, for example, sex education. The initial question is whether sex education may be made mandatory? If the only justification for doing so is to promote the majority's sexual mores, then the answer is no. Proper sexual mores does not implicate a core democratic value, and accordingly a democratic society must be prepared to tolerate a variety of sexual mores unless it can show serious public harm associated with particular sexual practices. If society is facing an epidemic of sexually transmitted diseases due to lack of knowledge of preventive measures, then the case for

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'there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political.'" *Id.* at 864. Taken literally, that might allow school authorities to advocate long-standing majority values of all types, as long as they did not deny students access to competing ideas. *Compare* *Runyon v. McCrary*, 427 U.S. 160 (1976), where the Court upheld, against a claimed violation of parents' rights and of the rights of free association and privacy, a law prohibiting private schools from discriminating on the basis of race in their admissions practices, while acknowledging the First Amendment right of the schools to "promote the belief that racial segregation is desirable." *Id.* at 176. Whatever the merits of that holding, it would most certainly be contrary to democratic principles and constitutionally impermissible for public school authorities to promote that idea if they could show it was a traditional moral value shared by the majority of the community. This extreme example of obviously impermissible value promotion extends, I assert, to all values school authorities might seek to promote, except for core democratic values.

<sup>137</sup> Consequently, when *Ambach*, *supra* note 129, speaks of one of the roles of public education as preserving "the values on which our society rests," and when *Fraser*, *supra* note 129, speaks of education's role in teaching "the boundaries of socially appropriate behavior," care must be taken not to extend those concepts beyond core democratic values and behavior necessary to preserve those values. On that score the decisions in both cases are questionable. The exclusion of lawful aliens from teaching in public schools, upheld in *Ambach*, sends an anti-immigrant message to students, some of whom are immigrants or the children of immigrants, and discriminates against people who contribute as much to the society as do citizens and whose services may well be needed in order to meet the educational needs of all students. And punishing a student for sexual innuendos in a high school election campaign speech, upheld in *Fraser*, while somewhat justifiable on captive audience grounds and per the arguable importance of civility in public discourse, smacks of an attempt to impose a particular and debatable notion of what acceptable discourse consists given the innocuousness of the student's remarks and the absence of any showing that they offended anyone or disrupted the election process.

requiring sex education becomes stronger.<sup>138</sup> Even if discussion of sexual matters outside the family violates some people's religious or philosophical beliefs, society is entitled to impinge on freedom of belief when necessary to prevent public harm and protect the interests of children.<sup>139</sup>

However, the fact that freedom of belief is at stake may limit how a mandatory sex education course may be taught. For example, since for religious and other reasons people have differing views on monogamy and non-marital sex, school authorities may

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<sup>138</sup> Compare, e.g., Jesse R. Merriam, *Why Don't More Public Schools Teach Sex Education: A Constitutional Explanation and Critique*, 13 WM. & MARY J. WOMEN & L. 539, 566-82 (2007) (concluding that those with religious objections to sex education have a strong claim to exemption absent a compelling governmental interest, and that despite the serious problem of sexually transmitted diseases there is no compelling interest in light of the availability of alternative ways to address the problem); Gary J. Simson & Erika A. Sussman, *Keeping the Sex in Sex Education: The First Amendment's Religion Clauses and the Sex Education Debate*, 9 S. CAL. REV. L. & WOMEN'S STUD. 265, 271-79 (2000) (arguing that the Free Exercise Clause does not require that those with religious objections be allowed to opt out of comprehensive sex education on the ground that mandatory attendance does not impose an undue burden on religious beliefs and that there is a compelling interest in exposing children to information about sexually transmitted diseases and in promoting their sexual development and psychological well-being).

<sup>139</sup> Preventing public harm was the basis for the decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), which rejected a free exercise challenge to the denial of unemployment benefits to Native Americans who used peyote for religious purposes in violation of a generally applicable law prohibiting its use as a harmful drug. The Court expressly declined to weigh the strength of the state's interest as against the adverse impact on religious beliefs. This departs from the approach in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), where on free exercise grounds the Court excused the Amish from having to comply with the state's compulsory education law following the eighth grade so as to be able to raise their children in the Amish way of life. In light of democratic principles, a balancing test seems appropriate here as a safeguard against the majority's imposing its cultural (and possibly religiously derived) preferences on society as a whole. On balance, *Yoder* seems a close and difficult case because of the strong state interest in a liberal democratic society of assuring that children receive an education that prepares them to participate in social life as adults, and of protecting children's interest in being able as adults to determine their destinies as free-willed individuals, as against the strong collective interest of the Amish in preserving a way of life that departs significantly from the ways of the greater society. Compare Alstott, *supra* note 71, at 33 (arguing that *Yoder* inappropriately privileged parental prerogatives and may have been wrongly decided on the merits in light of the importance of high school in enabling children to function as independent adults, but also arguing if the Amish are required to attend high school that "the state for its part should be obliged to engage with the parents to work out an educational solution that would treat the children and culture respectfully while also exposing the children to life options outside the Amish community"). In *Smith*, since the Native Americans made a strong showing of the centrality of peyote to their religious beliefs, a balancing test would have required the state to demonstrate significant societal harm from the use of peyote and significant interference with the state's purpose if Native Americans were exempt. If the state could not, this suggests either that it erred in criminalizing peyote and should perhaps not even pass a rational basis test or that cultural imperialism is at play. Moreover, if on balance democratic principles require that the Amish and Native Americans be exempt, they would also require an exemption for other similarly situated parties with comparable religious or philosophical beliefs.

promote neither the use of contraceptives nor abstinence as official policy absent a strong showing that one of the two is the only viable means of addressing the problem of sexually transmitted diseases.<sup>140</sup> It may be permissible to expose all students to the merits and demerits of both approaches, and perhaps for a teacher to express his or her personal views as long as care is taken to note that they are not official policy. On the other hand, in the interest of accommodating people's differing beliefs regarding sexuality, it may be preferable where practicable to allow students to opt among sex education classes that emphasize one or the other approach, and perhaps to opt out of sex education entirely if so doing would not severely undermine the effort to combat the problem.<sup>141</sup> Since democratic theory does not provide a clear-cut answer to the nuances

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<sup>140</sup> Compare Linda C. McClain, *Some ABCs of Feminist Sex Education (in Light of the Sexuality Critique of Legal Feminism)*, 15 COLUM. J. GENDER & L. 63, 67 (2006) (critiquing abstinence-only sex education as promoting a "conservative sexual economy" that in promoting marital sex "conflicts with important public values of sex equality, equal concern and respect for all members of society (including gay men and lesbians), and respect for reasonable moral pluralism," and that in making women sexual gatekeepers "is in tension with viewing them as responsible, self-governing persons . . . [and] places upon women the responsibility for men's behavior and men's sexuality, even as it insults men's moral capacity and relieves them of responsibility"; and advocating a "liberal feminist approach to sex education . . . [that] builds on the basic premises of "abstinence-plus" or comprehensive sex education by combining the provision of basic information about sexuality and contraception with clear messages about abstaining from sexual activity and deferring pregnancy and childrearing until one is emotionally, socially, and financially prepared"); Simson & Sussman, *supra* note 138, at 283-97 (arguing that abstinence-only sex education likely violates the Establishment Clause in either being intended to promote or having the effect of promoting a conservative Christian view of sexuality).

<sup>141</sup> Compare George W. Dent, Jr., *Of God and Caesar: The Free Exercise Rights of Public School Students*, 43 CASE W. RES. L. REV. 707, 732-33, 743 (1993) ("Citizens should . . . be allowed to shun instruction that offends them. In a liberal democracy, this right is not an exception to the state's power to promote values but, rather, an expression of the values it promotes. We value freedom of conscience and a right of parents to guide the moral and religious education of their children. The state observes these values when it excuses children from indoctrination that offends their religion. . . . Exemption from religiously offensive instruction should be granted unless government has a compelling reason for requiring all children to receive the instruction. Such grounds exist only if the exemption would leave a child without some basic knowledge or skill. By this standard, most requests for exemption should be granted."). In my view Dent's approach is both too broad and too narrow. It is not entirely clear whether Dent would limit the right to opt out of offensive instruction to religious grounds, or whether it would apply as well to philosophical or ideological objections not based on religion. If limited to religious grounds it is too narrow, since that would favor religion over other ways of thinking in violation of the democratic principle of the presumptive equality of all belief systems. It is too broad in that it would allow students to opt out of virtually all aspects of the curriculum from entire courses to particular assignments. Not only would this be difficult to administer, it would undermine school authorities' legitimate interest in ensuring that all students be exposed to core democratic values. My approach would be to allow school authorities substantial

of how best to design sex education, the appropriate judicial response is to allow experimentation with a variety of approaches.

## **VI. Conclusion**

A society truly committed to equal opportunity and equitable sharing, as I argue democratic principles and the Constitution properly interpreted require, would endeavor to respond proportionately to the educational needs of all. This is not happening today in the United States, and those on the short end of the stick are mainly ethnic minorities and the working class, disproportionate numbers of whom live in inner cities.

At the same time inner cities tend to be the most ethnically and economically diverse locales, and with gentrification are becoming increasingly so. In such cities, mandating that all students attend public school seems a potentially promising way, and given present political realities perhaps the only way, of equalizing educational opportunities for the disadvantaged while equitably responding to the educational needs of all. It is an experiment worth trying, and if attempted should be allowed to go forward.

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discretion to exempt students from objectionable aspects of the curriculum, as long as they do so in a way that treats all belief systems equally; and when school authorities decline to exempt to employ a balancing test that includes such factors as the strength of the state's interest in exposing children to the particular material, the degree to which required exposure is likely to offend people's beliefs, and the extensiveness of demanded exemptions. Since such cases will be quite fact specific, and since most will be resolved by lower courts, they are likely to result in diverse results in different jurisdictions. I regard school authority discretion and diverse results in cases as a positive in that it facilitates experimenting with a variety of approaches and because it provides families with some ability to choose to live in a jurisdiction whose educational program best suits their needs.